A TREATISE

UPON THE

LAW OF CHATTEL MORTGAGES,

IN THE

STATE OF NEW YORK.

BY
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Of the Elmira Bar.

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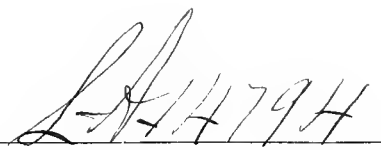

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PREFACE.

The subject of Chattel Mortgages occupies a prominent and important position in the jurisprudence of this State; there being more than one thousand reported cases involving this subject.

The aim of the writer has been to collate these cases, and lay before the student the principles involved in the more important of them; and to give the busy practitioner a book of ready reference to the law of chattel mortgages in this State.

It has not been thought best to go outside of the State for authorities, as such authorities are often in conflict with our own.

It is the hope of the author that this treatise will meet with the approval of the profession, and lighten the research of its busy members.

ELMIRA, N. Y., *April* 1, 1889.

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THE LAW

OF

CHATTEL MORTGAGES

IN THE

STATE OF NEW YORK.

CHAPTER I.

THE INSTRUMENT.

I. Nature and definition.
II. Form and requisites.
III. The parties.
IV. The subject matter.
V. Description of property.
VI. Execution and delivery.

I. Nature and Definition.

A chattel mortgage has been defined as an instrument whereby the owner of personal property transfers the title to such property to another, as security for the payment of a debt or obligation, subject to be defeated upon payment of the debt or obligation.

Jones on Chattel Mortgages, 1.
Porter v. Parmley, 52 N. Y. 185.
Betsinger v. Schuyler, 46 Hun, 353.
Nichols v. Mead, 2 Lans. 222.
Parshall v. Eggert, 54 N. Y. 18.

The legal title is vested in the mortgagee, and becomes absolute in law upon default.

Bragelman v. Daue, 69 N. Y. 69.
Neidig v. Eifler, 18 Abb. 353.
Stoddard v. Denison, 38 How. 296.
Moses v. Walker, 2 Hilt. 536.
Miner v. Judson, 2 Hun, 441.
Porter v. Parmley, 52 N. Y. 185.
Judson v. Easton, 58 N. Y. 664.
Noyes v. Wyckoff, 30 Hun, 466.
Langdon v. Buell, 9 Wend. 80.
Stewart v. Slater, 6 Duer, 96.
Lambert v. Leland, 2 Sweeny, 216.
Woodbridge v. Nelson, 6 Week. Dig. 248.
Parshall v. Eggert, 54 N. Y. 18.
Duffus v. Bangs, 43 Hun, 52.
King v. Walbridge, 48 Hun, 470.

Such legal title is extinguished by the payment of the debt by the mortgagor, and such payment operates as a waiver of the forfeiture.

West v. Crary, 47 N. Y. 423.

A chattel mortgage differs, in its structure and effect, entirely from a mortgage upon real estate. A real estate mortgage is only a lien, and conveys no title; a chattel mortgage transfers the title at once, subject to a defeasance by the performance of the condition annexed.

Noyes v. Wyckoff, 30 Hun, 466.

A bill of sale of chattels, absolute in its terms, becomes a mortgage upon proof by parol that it was made to secure a debt. Such evidence being always admissible for this purpose.

Despard v. Walbridge, 15 N. Y. 374.
Hodges v. Tenn. Marine & Fire Ins. Co., 8 N. Y. 416

Smith v. Beattie, 31 N. Y. 542.
Coe v. Cassidy, 72 N. Y. 133.
Michelson v. Fowler, 27 Hun, 159.
Tyler v. Strang, 21 Barb. 198.
Schoenrock v. Farley, 49 Supr. Ct. Rep. 302.
Stoddard v. Denison, 38 How. 296.
Nichols v. Lyons, 14 N. Y. St. Rep. 549; s. c., 47 Hun, 636.

The instrument, however, must contain an express promise to pay or a distinct acknowledgment of an existing debt, or an action will not lie.

Culver v. Sisson, 3 N. Y. 264.

Whether an instrument be in itself a chattel mortgage or not, is a question of law.

Fairbanks v. Bloomfield, 5 Duer, 434.

A mortgage of goods is a pledge, and more; for it is an absolute pledge to become an absolute interest if not redeemed at the specified time. After the condition is forfeited, the mortgagee has an absolute interest in the property, whereas a pawnee has but a special property in the goods, to detain them for his security.

Brown v. Bennet, 8 Johns. 96. Citing
Barrow v. Paxton, 5 Johns. 258.
2 Ves. Jr. 378.
1 Powell on Mortgages, 3.

II. Form and Requisites.

No particular form is necessary to constitute a chattel mortgage. The simple statement that a creditor is to have a lien, and that on default he may take possession and sell, and apply the proceeds upon the lien is sufficient.

McCaffrey v. Woodin, 65 N. Y. 465.

Any form of words by which the title is transferred as security for a debt, or obligation of any kind, to be defeated by the payment of the debt or the performance of the oblition is sufficient.

Bunacleugh v. Poolman, 3 Daly, 236.

A chattel mortgage may be valid although made by parol. But in such case delivery of the mortgaged property should accompany the parol contract.

Bank of Rochester v. Jones, 4 N. Y. 498.
Ackley v. Finch, 7 Cow. 290.
Ferguson v. Union Furnace Co., 9 Wend. 345.
Bardwell v. Roberts, 66 Barb. 433.
Ceas v. Bramley, 18 Hun, 187.

A mortgage is void as to creditors, which provides for a substitution of other property, to take the place of the property described in the mortgage.

Carpenter v. Simmons, 28 How. 12.
Edgell v. Hart, 9 N. Y. 216.
Gardner v. McEwen, 19 N. Y. 123.
See Brackett v. Harvey, 91 N. Y. 214.

But it would be valid as to the property described in the mortgage, although containing such a provision.

Gardner v. McEwen, *supra*.
Van Heusen v. Radcliff, 17 N. Y. 580.

A chattel mortgage need not be acknowledged in order to require the town clerk to file it.

Maxwell v. Inman, 42 Hun, 267.

A chattel mortgage need not be under seal.

Gibson v. Warden, 14 Wall. 244.
1 Wait's Law and Pr. 131.
Thompson v. Blanchard, 4 N. Y. 303.

If a chattel mortgage is acknowledged, proved, or certified in the manner prescribed by law for taking and certifying the acknowledgment or proof of the conveyance of real property, it thereupon becomes evidence, as if it was a conveyance of real property, and would not need to be proved otherwise than such a conveyance.

2 Rumsey's Practice, 99, citing
Code Civ. Pro., § 937.

A chattel mortgage should specify a time of payment, otherwise it is due immediately.

Dikeman v. Puckhafer, 1 Abb. (N. S.) 32.
Howland v. Willett, 3 Sandf. 608.

If a greater sum than is really due is expressed in the mortgage, that mere fact does not render it fraudulent in law.

Frost v. Warren, 42 N. Y. 204.

A chattel mortgage may be payable in instalments.

Willis v. O'Brien, 3 Jones & Spencer, 537.

If the instrument be in the form of a bill of sale, it will be construed as a chattel mortgage, if that was the agreement at the time of its execution.

Preston v. Southwick, 42 Hun, 293.

III. The Parties.

All persons who are legally competent to make a contract, may also make a chattel mortgage.

2 Wait's Actions and Defenses. 168.

A man may make a valid chattel mortgage to his wife.

Smith v. Post, 1 Hun, 518.
Manchester v. Tibbetts, 19 N. Y. St. Rep. 299.

A married woman may give a chattel mortgage.

Talman v. Hawkhurst, 4 Duer, 221.

A chattel mortgage may be executed by an agent, who is authorized for that purpose; his authority may be either verbal or written, or by subsequent ratification.

Brownell v. Hawkins, 4 Barb. 491.

An infant may make a chattel mortgage, and such mortgage will be voidable only and not void.

Hanyen v. Hachmeister, 49 Supr. Ct. Rep. 34.
Chapin v. Shafer, 49 N. Y. 407.

A member of a firm may make a chattel mortgage in the firm name, covering the partnership property, to secure a firm debt, without the knowledge or consent of his partners.

Stewart v. Slater, 6 Duer, 96.
Mablett v. White, 12 N. Y. 454.
Graser v. Stellwagen, 25 N. Y. 315.
Van Brunt v. Applegate, 44 N. Y. 544.
Kennedy v. The National Union Bank, 23 Hun, 497.
Neer v. Oakley, 18 N. Y. St. Rep. 374.

One partner may make a valid mortgage of firm property in his own name, if the mortgage be ratified by the other partners.

Kennedy v. The National Union Bank, *supra*.

The acquiescence of the other partners whether given

at the time or subsequently, will place its validity beyond question.

Skinner v. Dayton, 19 Johns. 513.
Smith v. Ker, 3 N. Y. 144.

One tenant in common may make a valid chattel mortgage of his individual interest.

Shuart v. Taylor, 7 How. 251.
Thomas v. Bacon, 34 Hun, 88.

A joint stock company can make a valid chattel mortgage.

Nelson v. Drake, 14 Hun, 465.

Any corporation founded under the General Manufacturing Law of 1848, can make a valid chattel mortgage.

Lord v. Yonkers Fuel Gas Co., 99 N. Y. 551.

Two or more persons may take one mortgage to secure separate and distinct debts, and the fraudulent intent of one, will not affect the rights of the other. The mortgage will be void as to one, and good as to the other.

Under such form of mortgage each would hold the property independently of the other, in proportion to the debt secured.

Smith v. Post, *supra.*

IV. Subject Matter.

A chattel mortgage requires a subject in existence, and an ownership and control in the mortgagor, and it can have no validity where neither the property, nor the agent for its production, is in the possession of the mortgagor.

Farmer's Loan & Trust Co. v. Long Beach Improvement Co., 27 Hun, 89.

A potential existence is sufficient, but the underlying principle in all these cases is, that the right to the property when it shall come into actual existence, is a present vested right.

Betsinger v. Schuyler, 46 Hun, 352.

No principle known to the law will allow a valid chattel mortgage on property not in existence, either actual or potential.

Farmer's Loan & Trust Co. v. Long Beach Improvement Co., *supra*. Citing
Gardner v. McEwan, 19 N. Y. 123.
Edgell v. Hart, 9 N. Y. 213.
Otis v. Sill, 8 Barb. 102.
Williman v. Neher, 20 Barb. 37.
Conderman v. Smith, 41 Barb. 404.
McCaffrey v. Woodin, 65 N. Y. 460.
Brunswick Balke-Collender Co. v. Stevenson, 21 N. Y. St. Rep. 862.

But as between the parties, a chattel mortgage upon property to be acquired in the future is valid.

Ludwig v. Kipp, 20 Hun, 265.
Hale v. Omaha Nat. Bank, 49 N. Y. 634.
Reynolds v. Ellis, 103 N. Y. 122.

Crops to be raised are an exception to the general rule, that title to property not in existence cannot be affected so as to vest the title when it comes into being. In the case of crops to be sown, it vests potentially from the time of the executory bargain, and actually as soon as the subject arises.

Green v. Armstrong, 1 Den. 550.
Smith v. Taber, 46 Hun, 316.
Betsinger v. Schuyler, 46 Hun, 352.

Growing grass may be mortgaged when owned by a tenant.

Green v. Armstrong, *supra*.

Wool upon the sheep's back is the subject of chattel mortgage.

Cressey v. Sabre, 17 Hun, 122.

The owner of a dairy may make a valid mortgage of the future products of such dairy, provided that at the time of the execution of the mortgage, the mortgagor is the owner of the dairy.

Betsinger v. Schuyler, 46 Hun, 353.

Nursery stock, consisting of trees, plants and shrubs, planted by a tenant for the purpose of commerce, may be mortgaged.

King v. Wilcomb, 7 Barb. 263.
Hamilton v. Austin, 36 Hun, 138.
Duffus v. Bangs, 43 Hun, 53.

A life insurance policy may be the subject of a chattel mortgage.

King v. Van Vleck, 109 N. Y. 367.

May be given to secure future advances.

Wescott v. Gunn, 4 Duer, 107.
Fairbanks v. Bloomfield, 5 Duer, 440.
Bank of Utica v. Finch, 3 Barb. Ch. 293.
Monnat v. Ibert, 33 Barb. 24.
Ripley v. Larmouth, 56 Barb. 21.
Miller v. Lockwood, 32 N. Y. 293.
Brown v. Keifer, 5 Week. Dig. 485.
Carpenter v. Blote, 1 E. D. Smith, 491.
Craig v. Tappin, 2 Sandf. Ch. 78.
Walker v. Snediker, 1 Hoff. Ch. 145.
Brown v. Guthrie, 110 N. Y. 442.

A chattel mortgage may also be a continuing security to cover both present and future indebtedness.

Brown v. Keifer, 71 N. Y. 610.

It may be stated generally that every kind of personal property may be mortgaged, even if it is exempt from levy and sale under execution.

2 Wait's Actions and Defenses, 170.

V. Description of Property.

The general rule as to description is, that any description will suffice that will enable third persons to identify the property, aided by inquiries and evidence.

Matthews v. Sniffen, 10 Daly, 202.
Conkling v. Shelley, 28 N. Y. 362.
Russell v. Winne, 37 N. Y. 593.

Oral evidence is competent to identify the articles described in the mortgage.

Dodge v. Potter, 18 Barb. 201.
Caring v. Richmond, 28 Hun, 25.

Oral evidence may also be given to fix the quantity of goods covered by the mortgage when the quantity is not stated.

Dunning v. Stearns, 9 Barb. 630.

Where the description is *erroneous*, oral evidence may be given to correct it.

Dodge v. Potter, *supra*.

A portion of a description which is false or inconsistent with the rest of the description, may be rejected, if the remainder of the description is sufficient to pass the property.

Dodge v. Potter, *supra*.

A chattel mortgage conveying "all personal property whatever," owned by the mortgagor, and also "all growing crops of all kinds," is too indefinite, and cannot be said to give notice of the lien to execution creditors.

Riley v. Sexton, 32 Hun, 249. Citing
Wood v. Lester, 29 Barb. 145.
Wintermute v. Light, 46 Barb. 282.

A general description covering all the goods in a store, and stock in trade, was held sufficient.

Conkling v. Shelley, 28 N. Y. 362.
Russell v. Winne, *supra*.

A description covering the stock in trade, and merchandise, and also, all "the increase and decrease thereof," was held to be wholly void.

Mittnacht v. Kelly, 5 Abb. (N. S.) 442.
But see Brackett v. Harvey, 91 N. Y. 214.

A mortgage of real estate used as a sugar refinery, which specified "and also all the machinery and effects in the said sugar refinery," was held sufficient to cover the sugar in stock on the premises.

Thurber v. Mintburn, 62 How. 27.

A mortgage of the "ashes in the ashery now in the possession of" (the mortgagor) is a sufficient description.

Dunning v. Stearns, 9 Barb. 630.

A general clause after a specific enumeration of articles will extend the mortgage over the property embraced in the general term, if the intent is clear from the language used so to do.

Russell v. Winne, 37 N. Y. 593.

Where a schedule is annexed to a mortgage, and is referred to in it, it becomes a part of the mortgage, and both papers are to be construed together.

Edgell v. Hart, 9 N. Y. 215. Citing
Roberts v. Chenango Mut. Ins. Co., 3 Hill, 501.
Hills v. Miller, 3 Paige, 254.

Where there is a conflict between the mortgage and the schedule, the former must govern.

Matthews v. Sniffen, 10 Daly, 202.

A lease in which the lessee mortgages all his property upon the premises, to the mortgagor as security for the rent, and which provided for an inventory of said property thereafter to be made and annexed, is valid although no inventory was ever annexed thereto.

Van Heusen v. Radcliff, 17 N. Y. 580.

Where a mortgage was made of "11 M feet of pine lumber now in the shop of the mortgagor," there was only about one-fifth of that quantity there at the time of the execution of the mortgage, oral evidence was admitted to show that the balance had been purchased by the mortgagor and not yet delivered.

Galen v. Brown, 22 N. Y. 40.

VI. Execution and Delivery.

The question of delivery is one of fact for the jury, and it is always competent to show that it was never delivered, or that it was delivered as an escrow, or that the mortgagee obtained possession of it by fraud.

Roberts v. Jackson, 1 Wend. 478.

A delivery and acceptance are essential to constitute a valid mortgage. Without these there is only an attempt to make a mortgage.

Jones on Chattel Mortgages, 106.

There must be some act showing that the grantor intends that it shall take effect. That act is delivery to the grantee, actual or presumed. Merely to sign, seal and acknowledge a writing, and then to keep it in one's possession conveys no title.

Messelback v. Norman, 46 Hun, 416.

The date recited in a chattel mortgage is only *prima facie* evidence of the time of its execution, and the true date may be shown by oral evidence.

Fuller v. Acker, 1 Hill, 173.

If a mortgage be made to several creditors, the refusal of one to accept it, does not impair the mortgage as to those who have accepted it.

Brown v. Clapp, 8 Bosw. 324.

May be executed by an agent duly authorized for that purpose.

Brownell v. Hawkins, 4 Barb. 491.

CHAPTER II.

ON THE FILING AND RE-FILING OF CHATTEL MORTGAGES.

I. Where filed.
II. How filed.
III. Effect of omission to file.
IV. Where re-filed.
V. How re-filed.
VI. When re-filed.
VII. Effect of omission to re-file.

I. Where Filed.

The statute of 1833, chapter 279, provides as follows:

Section 1. "Every mortgage or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of this act."

§ 2. "The instruments mentioned in the preceding section, shall be filed in the several towns and cities of this State where the mortgagor therein, if a resident of this State, shall reside at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument. In the city of New York, such instrument shall be filed in the office of the register of said city. In the several cities of this State, other than the city of New York, and in the several towns of this State in which a county clerk's office is kept, in such office; and in each of the other towns of this State, in the office of the town clerk thereof; and such register and clerks are hereby required to file all

such instruments aforesaid presented, to them respectively for that purpose, and to endorse thereon the time of receiving the same, and shall deposit the same in their respective offices, to be kept there for the inspection of all persons interested."

The object of the statute making the filing of chattel mortgages necessary to preserve the lien as to creditors, is the same as the registry acts respecting mortgages of real estate, viz., — to prevent imposition upon subsequent purchasers and mortgagees, and to prevent them from being misled by the possession and apparent absolute ownership of the mortgagor

Meech v. Patchin, 14 N. Y. 72.
Patterson v. Gillies, 64 Barb. 563.
Mack v. Phelan, 92 N. Y. 25.

The invalidity of a chattel mortgage as against creditors, because it has not been filed, is not based on the ground of fraud; and it is not deemed fraudulent by reason of the omission to file, but the purpose of the statute is to furnish means of notice of the lien, and the consequence of the omission is in the nature of a penalty for such neglect.

Niagara Co. Nat. Bank v. Lord, 33 Hun, 557. Citing
Ball v. Slafter, 26 Hun, 355.
Southard v. Benner, 72 N. Y. 428.

In the city of New York, the proper place to file a mortgage of personal property is the register's office. In all the other cities of the State, and in the towns of the State in which a county clerk's office is kept, the instrument must be filed in such county clerk's office; and in each of the other towns of the State in the office of the town clerks thereof.

Martin v. Rothschild, 6 N. Y. St. Rep. 76; s. c., 42 Hun, 410.

It was enacted by the Laws of 1864, chapter 412, that every person having a lien by chattel mortgage on any boat navigating the canals of this State, is required to file the same in the office of the auditor of the canal department, and if not so filed should be void against creditors.

Keller v. Paine, 11 N. Y. St. Rep. 330; s. c., 107 N. Y. 83; see chapter 69, Laws of 1883.

By an act of Congress passed July 29, 1850, it is provided that every mortgage of any vessel of the United States shall be recorded in the office of the collector of customs where such vessel is registered or enrolled.

The courts of the United States have held that the statute gives validity to a mortgage, otherwise free from objection, whatever may be the laws of the State where it is executed, or where the mortgagee or mortgagor may reside.

Such mortgage need not be again filed in the clerk's office as required by our statute.

Folger v. Weber, 16 Hun, 515. Citing
White's Bank v. Smith, 7 Wall. 646.
Aldrich v. Ætna Co., 8 Wall. 491.

A mortgage given by a joint stock company, must be filed in the town clerk's office of the town where the principal office of the company is located, and its business principally carried on.

Nelson v. Neil, 15 Hun, 383.

The instrument must be filed in the clerk's office of the town in which the mortgagor resided at the time of its execution, whether the mortgagor be a resident of that town or not, at the time of the filing.

Hicks v. Williams, 17 Barb. 523.

The *fact* of the place of residence controls the place of filing, not the recital of it in the instrument. That is of no

importance, and might for the matter of the security be omitted altogether.

Chandler v. Bunn, Lalor's Supplement to Hill and Denio, 167.

The subsequent removal of the mortgagor into the town where it is filed will not remedy the defect; the language of the statute is clear.

Powers v. Freeman, 2 Lans. 127.

If the mortgagor be a non-resident, the mortgage must be filed in the city or town where the property so mortgaged shall be at the time of the execution of such instrument.

Laws of 1833, chapter 279, section 2.

A mortgage made by joint mortgagors as partners, residing in different towns, must be filed in each of the towns in which the mortgagors reside.

Stewart v. Platt, 101 U. S. 731.

In that case, the mortgagors resided in Westchester county, and were lessees of a hotel in the city of New York. They made a mortgage of the furniture of the hotel which was filed in the office of the register of deeds for the city and county of New York, but was not filed in the towns where the mortgagors respectively resided, as required by our statute.

It was held that the mortgage was not properly filed.

Mr. Justice Harlan, delivering the opinion of the court, said: "The contention of learned counsel for the appellants is that the firm was the mortgagor; that its residence or domicile was in the city of New York; and that the manifest object of the statute was met by filing the several mortgages in the city where the firm carried on its business. The question thus presented is within a very narrow com-

pass, and is not free from difficulty. Its solution depends upon the meaning of the word *reside*, employed in the statute; it is to be regretted that we are not guided by some direct controlling adjudication in the courts of New York construing the statute under examination, but no such decision has been brought to our attention. With some hesitation we have reached the conclusion that a chattel mortgage executed by a firm upon firm property, is void under the New York statute as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the city or town where the individual members of the firm severally reside. The statute upon its face furnishes persuasive evidence that its framers intended to make a sharp distinction between the place where the property might be at the time of the execution of the mortgage, and the place of the mortgagor's residence. If he be a non-resident of the State of New York, the mortgage may be filed in the town or city where the property shall be at the time of the execution of the mortgage. If he be a resident, then his residence, not the actual situs of the property, governs. If these instruments be executed by several resident mortgagors, the statute would seem to require that the mortgage be filed in the towns or cities where the mortgagors at the time respectively reside."

The removal of a mortgagor from the town or county in which he resided when the mortgage was executed, and the taking of the mortgaged property with him, does not necessitate the filing of it again in the town or county to which he has removed.

Hicks v. Williams, 17 Barb. 523.

Chattel mortgages upon property in the town of Flatbush, Kings county, should be filed in the office of the clerk of that town, and not in the office of the register of Kings county, notwithstanding Laws of 1852, chapter 83, requiring the register of Kings county to do like acts required to be done by the register in the city of New York.

Martin v. Rothschild, 42 Hun, 410.

II. How Filed.

As to the manner of filing a chattel mortgage, the mortgagee is not bound to do any thing more than to deliver the mortgage at the proper office, and to the proper officer, or to any person of proper age who has charge of the office.

2 Wait's Actions and Defenses, 195.

A delivery of a chattel mortage to the clerk while absent from his office, and an endorsement made thereon, that it is then and there filed, is not a filing. It is not filed in reality until it is deposited in the clerk's office.

Hathaway v. Howell, 54 N. Y. 103.

The statute contains no directions as to the *time* in which a chattel mortgage should be filed, and in the absence of such provision, the courts have no power to supply the deficiency, or to declare a mortgage void because of its not having been filed at the time it was executed.

Hicks v. Williams, 17 Barb. 523.

It should be filed as soon as practicable after the mortgage is executed. Delay in filing only subjects the mortgagee to the rights of intervening creditors and *bona fide* purchasers.

Parshall v. Eggert, 52 Barb. 537.
Hicks v. Williams, 17 Barb. 523.
Wescott v. Gunn, 4 Duer, 107.

Where the office of town clerk being vacant, a person who has charge of the office received a chattel mortgage brought to the office, filed it, endorsed it, and placed it among the chattel mortgages on file, held, that this was a valid filing within the meaning of the statute.

Bishop v. Cook, 13 Barb. 326.

An error of the clerk in filing the mortgage does not invalidate it. It is good as against subsequent purchasers. The remedy of the purchaser is against the clerk.

Dikeman v. Puckhafer, 1 Daly, 489.

It is the duty of the register to index a chattel mortgage duly filed with him, and his omission to do so cannot prejudice the lien of a mortgagee who has done all required of him to make the mortgage valid.

Dikeman v. Puckhafer, *supra.*

The filing by a clerk in the store of the town clerk, in charge of the town clerk's office is a sufficient filing.

Dodge v. Potter, 18 Barb. 201.

The original mortgage need not be filed. A copy is sufficient under the statute. It must be a true copy. But a trifling mistake will not vitiate upon the principle that the law will not regard trifles; but the object of the statute must be regarded, and any attempt at compliance not attaining such object will be held a nullity.

Ely v. Carnley, 19 N. Y. 498.

After a mortgage has been filed, the advantage of such filing may be lost, by taking it from the file of the clerk's office. Such removal will suspend its validity during the time it is off the file.

Swift v. Hart, 12 Barb. 531.
Fox v. Burns, 12 Barb. 677.

III. Effect of Omission to File.

The omission to file a chattel mortgage does not vitiate the mortgagee's right against a mortgagee or purchaser with

knowledge; and such unfiled mortgage is good as against all subsequent incumbrancers with knowledge of its existence, except a judgment creditor.

Zimmer v. Wheeler, 2 N. Y. St. Rep. 325; s. c., 41 Hun, 638. Citing
Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484.
Gildersleeve v. Landon, 73 N. Y. 609.

The statute does not render a chattel mortgage absolutely void for the omission to file, but simply declares it void as to judgment creditors and subsequent purchasers in good faith. As to other persons it is valid without filing.

Hayman v. Jones, 7 Hun, 238.

If a purchaser has notice of an unfiled mortgage at the time of purchase, that notice stands in the place of filing, and his purchase is subject to the lien of the mortgage.

Mack v. Phelan, 92 N. Y. 25.

The omission to file a chattel mortgage as required by the statute, makes the security void *per se*, but it is only void as against judgment creditors and subsequent purchasers in good faith. A purchaser with notice cannot claim to be a purchaser in good faith within the statute.

Sanger v. Eastwood, 19 Wend. 514.

The omission to file does not affect its validity as between the parties, and a delay in filing it only renders it void as against an intervening purchaser in good faith, or an intervening creditor by execution.

Wescott v. Gunn, 4 Duer, 107.
Smith v. Acker, 23 Wend. 653.
Hayman v. Jones, 7 Hun, 238.
Pancoast v. The American Heating and Power Co., 66 How. 49.

It has been the settled law of this State since the decision in the case of *Thompson* v. *Van Vechten*, 27 N. Y. 568, that a mortgage not filed, of a chattel not delivered, is void as to a creditor at large whose claim accrues while the default in filing continues, though such creditor is not in a position to raise the question until he has obtained judgment or process against the property.

Campbell Printing Press Co. v. Damon, 16 N. Y. St. Rep. 133; s. c., 48 Hun, 509.

The subsequent delivery of the property and foreclosure of the mortgage, could not affect the rights of creditors which had already attached.

Ibid.

A chattel mortgage is valid although not filed as against a general creditor.

Button v. Rathbone, Sard & Co., 43 Hun, 148.

A creditor, to take advantage of the omission to file, is he who has a judgment and proceeds upon that, and procures an attachment or execution.

Hendricks v. Robinson, 2 Johns. Ch. 296.
Brinkerhoff v. Brown, 6 Johns. Ch. 139.
Fox v. Mayer, 54 N. Y. 129.
Heye v. Bolles, 33 How. 277.
Hotchkiss v. McVickar, 12 Johns. 407.
Stewart v. Beale, 68 N. Y. 629.
Kennedy v. Nat. Union Bank., 23 Hun, 496.
Niagara Co. Nat. Bank v. Lord, 33 Hun, 557.
Campbell Printing Press Co. v. Damon, 16 N. Y. St. Rep. 133; s. c., 48 Hun, 509.
Jones v. Graham, 77 N. Y. 628.
Sullivan v. Miller, 106 N. Y. 641.

The fact that the creditor had knowledge of the mortgage makes no difference, as under the statute, the instrument is as to him void, unless the same is filed.

Best v. Staple, 61 N. Y. 71.

A second mortgagee who has personal knowledge of the existence of a prior chattel mortgage, is not entitled to priority over it, although the second mortgage is first filed.

Zimmer v. Wheeler, 2 N. Y. St. Rep. 325; s. c., 41 Hun, 638.

In case of two chattel mortgages executed by the same person upon the same property, but to different persons, dated the same day and filed the same moment, where it was the agreement and intention of the parties, that one should have a preference over the other as a lien, that agreement must be sustained, and effect must be given to it, and the intention of the parties.

Wray v. Fedderke, 11 Jones & Spencer, 338.

An unfiled mortgage on property subsequently brought by the mortgagor into a firm, of which he has become a member, as his portion of the capital, is not invalid as to the other partners by reason of its non-filing. The property comes into the concern impressed with the lien of the mortgage.

Rust v. Hauslet, 46 Supr. Ct. Rep. 24.

Leases for years of real estate, and assignments thereof by way of mortgage, are not within the acts relating to the recording or filing of chattel mortgages. Such leases are chattels real, and not mere chattels.

Breese v. Bauge, 2 E. D. Smith, 474.
Booth v. Kehoe, 71 N. Y. 341.

An assignee for the benefit of creditors is not a purchaser in good faith within the meaning of the statute, and cannot take advantage of an omission to file a chattel mortgage. The statute does not say that such failure makes the mortgage fraudulent as to creditors, but simply that as to them it shall be void. And the act of 1858 giving an assignee for the benefit of creditors the right to invalidate a transfer of property, extends only to defects based upon fraud or fraudulent intent.

Southard v. Benner, 72 N. Y. 424.
Ball v. Slafter, 26 Hun, 355.

The power of an assignee for the benefit of creditors, executor, administrator, receiver, or other trustee, to impeach fraudulent acts of the assignor, testator, etc., conferred by chapter 314 of the Laws of 1858, does not enable him to set aside a chattel mortgage, merely upon the ground that it was not duly filed; for the omission, although it avoids the mortgage as to creditors, does not make it within the meaning of the statute a fraudulent act. The purpose of the statute (1858) is to confer power to treat as void, etc., only acts done, and transfers made with fraudulent intent.

Chrisfield v. Bogardus, 18 Abb. N. C. 334.

The lien of a chattel mortgage duly filed, is superior to one created subsequently by the mortgagor for the *expense* of keeping the mortgaged property.

Bissell v. Pearce, 28 N. Y 252.

A provision in a lease, by which a lien is given upon products from the property leased, as security for the rent, is in effect a chattel mortgage, and must be filed. (Follett, J., dissenting.)

Betsinger v. Schuyler, 46 Hun, 352. Citing
Johnson v. Crofoot, 53 Barb. 574.

Yenni v. McNamee, 45 N. Y. 615.
Steffin v. Steffin, 4 Civ. Pro. Rep. 187.
McCaffrey v. Woodin, 65 N. Y. 459.
Thomas v. Bacon, 34 Hun, 88.
Hawkins v. Giles, 45 Hun, 318.

These cases holding that if said mortgage is not filed it is invalid as against the persons described in section three of the act of 1833.

A provision in a lease by which it is agreed that the lessor is to have a lien upon the growing crops, must be filed to be valid against mortgagees in good faith.

Duffus v. Bangs, 43 Hun, 53.

A farm lease upon shares which provides that the lessor shall have a lien upon all crops sown on the premises, as security for the performance of the *covenants* under the lease, must be filed.

Thomas v. Bacon, 34 Hun, 88.

A clause in a lease of real estate which provides that the lessor shall have " a lien as security for all the rent," etc., upon all goods, wares and merchandise, and all other personal property which are, or may be on the premises demised, held, that such lien might be enforced, and a sale had thereunder the same as under a chattel mortgage, and that the same must be filed, and that if not filed, it was void as against creditors.

Reynolds v. Ellis, 34 Hun, 47; S. C., 103 N. Y. 122.

The omission to file a chattel mortgage, executed by a corporation in another State, does not affect its validity.

The statutes requiring the filing of such mortgages have no extra territorial force.

Nichols v. Mase, 25 Hun, 640. Citing
Ætna Ins. Co. v. Aldrich, 26 N. Y. 96.
Egerly v. Bush, 81 N. Y. 199.

A mortgagee of chattels cannot obtain a lien upon other similar chattels, as against a subsequent purchaser thereof, through a verbal arrangement between himself and his mortgagor, to consider them substituted in the place of those described in the mortgage. He must pursue the statute respecting the filing literally.

Powers v. Freeman, 2 Lans. 127.

A chattel mortgage, valid in other respects, is not invalid as against one purchasing of the mortgagor with knowledge of its existence, although not filed.

Gildersleeve v. Landon, 73 N. Y. 609.

A purchaser, who purchases property within the year, covered by a chattel mortgage, although having constructive notice of the mortgage, by reason of its being filed, can convey good title to a purchaser after the expiration of the year, such person being a subsequent purchaser.

Wooster v. Sherwood, 25 N. Y. 286.
Dillingham v. Bolt, 37 N. Y. 197.

A chattel mortgage on file contained a clause referring to the conditions of another instrument, and provided that upon default in the performance of those conditions, the mortgage debt should become due and payable at once.

This second instrument was not filed. It was held, however, that the mortgage was valid, and was duly filed.

Shuler v. Boutwell, 8 Week. Dig. 442.

OF THE REFILING OF CHATTEL MORTGAGES.

IV. Where Refiled.

Section three of the act of 1833, as amended by chapter 501 of the Laws of 1873, and further amended by chapter 418 of the Laws of 1879, reads as follows: "Every mortgage filed in pursuance of this act shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of such mortgage, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him, by virtue thereof, shall be again filed in the office of the clerk or register aforesaid, in the town or city where the mortgagor shall then reside. If the mortgagor shall then be a resident of this State, and if not such resident, then in the office of the clerk or register of the town or city where the property so mortgaged, was at the time of the execution of such mortgage."

The mortgage must be refiled if the mortgagor is a resident of the State, in the clerk's office of the town or city where he shall then reside. If not such resident, then in the office of the clerk or register of the town or city where the mortgaged property was at the time of the execution of the mortgage.

Laws of 1879, chapter 418.

V. How Refiled.

The object of the refiling is merely to extend and continue in operation the effect of the first filing, as to the amount remaining unpaid for another year, and to make

known to all interested the state of the property, and the incumbrance upon it from year to year.

Dillingham v. Bolt, 37 N. Y. 200.
Marsden v. Cornell, 62 N. Y. 219.

The statement of the mortgagee's interest required by the statute upon the refiling of a chattel mortgage, must be made by the mortgagee in person, or by his attorney. A statement made by the mortgagor, or by third persons, is not sufficient.

Osborn v. Alexander, 40 Hun, 328.

Under the provisions of the statute, a statement is sufficient which annexes and refers to another document filed with it, if the two papers read together in connection with the original mortgage, disclose the intent of the mortgagee intelligibly. Thus, on refiling a chattel mortgage which was given to secure certain notes, and also certain outstanding liabilities, the statement annexed was, that the *unpaid notes* constituted the amount of the mortgagee's interest, and made no reference to the outstanding liabilities.

The statement was held good as to the notes, but not good as to outstanding liabilities.

Beers v. Waterbury, 8 Bosw. 396.

The filing of a new mortgage in place of the old one, and filing it within the time prescribed, is not sufficient, for this is not a declaration by the mortgagee of his interest.

Osborn v. Alexander, 40 Hun, 323.

But such filing of a new mortgage does not affect the lien of the mortgage, nor render it invalid, except that the mortgagee takes the risk of a levy upon an execution, after the first mortgage ceased to be a lien, and before the new one was filed.

Walker v. Henry, 85 N. Y. 134.

The filing of a true copy, without the filing of the statement of the mortgagee's interest, is not sufficient. There must be both a copy and a statement.

Marsden v. Cornell, 62 N. Y. 219.

A clerical error in the copy of a chattel mortgage and the accompanying statement of the amount claimed, by which the amount is overstated $100, is fatal.

Ely v. Carnley, 19 N. Y. 496.

The *mortgagor*, with the concurrence of the mortgagee, made at the expiration of the year, the following endorsement, and filed the same: "This chattel mortgage is hereby renewed for one year from this date. As witness my hand and seal.
Sworn to," etc.

The effect of this act by the mortgagor was to create a new mortgage, and such statement was held good as against an execution creditor.

Smith v. Cooper, 22 Hun, 11.

Where a chattel mortgage has been duly filed in the proper clerk's office, and within the time specified in the statute, the *original* mortgage, with an endorsement thereon, exhibiting the mortgagee's interest in the property, is refiled in said office such refiling is equivalent to filing a true *copy* as required by the statute, and a sufficient compliance with it.

Stockham v. Allard, 2 Hun, 67. Citing
Dillingham v. Bolt, 37 N. Y. 197.
Fitch v. Humphrey, 1 Den. 163.
Patterson v. Gillies, 64 Barb. 563.
Powers v. Freeman, 2 Lans. 127.

In the absence of fraud, it is not essential to the validity of the mortgage and the preservation of the lien, that the

statement should be definite and accurate even to the smallest amount. If it is made in good faith, with reasonable care, and is substantially correct and accurate, it is sufficient. Thus: a statement in these words, "The above is a true copy of a chattel mortgage on file at , on which the whole, or nearly the whole amount is unpaid, and due April 1, 1870," was held a compliance with the statute, and sufficiently definite.

Patterson v. Gillies, *supra.*

An understatement of the amount due, does not affect the validity of the mortgage as to the amount which is stated.

Beers v. Waterbury, 8 Bosw. 346.

A statement upon refiling is sufficient, although it failed to give a credit of $2 upon a debt of several hundred dollars.

Patterson v. Gillies, *supra.*

A statement that "somewhere about the sum of $60 as near as can be ascertained," remained unpaid upon the mortgage, was accepted as sufficiently accurate.

Dillingham v. Bolt, *supra.*

VI. When Refiled.

The statute provides that every mortgage shall cease to be valid against creditors, subsequent purchasers and mortgagees in good faith, unless within thirty days next preceding the expiration of each and every term of one year after the filing of such mortgage, a true copy of such mortgage and statement shall be filed, etc.

Laws of 1879, chapter 418.

A refiling before the commencement of the thirty days would be as nugatory as one after the expiration of that time.

Newell v. Warner, 44 Barb. 258.

A refiling of a chattel mortgage after the expiration of the year, restores and revives the lien, and is valid as against creditors and purchasers.

Nixon v. Stanley, 33 Hun, 248. Citing
Swift v. Hart, 12 Barb. 530.

And overruling in effect

Newell v. Warner, *supra.*

A mortgagee of chattels, to uphold his title as against the creditors of the mortgagor, if the property remain in the possession of the mortgagor, must refile his mortgage within the year as required by the provisions of the act, although default has been made in the payment.

Ely v. Carnley, 19 N. Y. 496.
Porter v. Parmly, 52 N. Y. 187.
Steele v. Benham, 84 N. Y. 634.

So the second year, and each successive year, it must be accompanied with a statement of just the amount still unpaid, so that it may appear what has been paid, if any thing, or whether the debt has increased by the interest upon it. It is a fraud if this be not stated truly.

Marsden v. Cornell, 62 N. Y. 219.

No subsequent refiling after the first, seems to be necessary under the statute of 1864, to keep a chattel mortgage a continuing security upon a canal boat.

If the last day of refiling falls on Sunday, the mortgage must be refiled on or before the Saturday preceding.

Newell v. Warner, *supra.*

VII. Effects of Omission to Refile.

The statute provides, that unless refiled a mortgage shall cease to be valid against creditors, subsequent purchasers and mortgagees in good faith, etc. A chattel mortgage, however, is valid as against the mortgagor although not refiled.

Steward v. Cole, 4 N. Y. St. Rep. 429; s. c., 43 Hun, 164.
Hayman v. Jones, 3 Week. Dig. 230; s. c., 7 Hun, 238.

The omission to refile at the end of the year, the statement and mortgage, renders the mortgage invalid as against creditors.

Marsden v. Cornell, 62 N. Y. 215.
Steele v. Benham, 84 N. Y. 634.

But the failure to refile, does not render it invalid as against a receiver appointed in supplementary proceedings, for the reason that the receiver stands in the place of the mortgagor.

Steward v. Cole, *supra.*

A purchaser, with actual knowledge of the existence of a chattel mortgage, cannot take advantage of its not having been legally renewed.

Thompson v. Van Vechten, 6 Bosw. 375.
Gregory v. Thomas, 20 Wend. 17.
Lewis v. Palmer, 28 N. Y. 271.

The omission to refile a chattel mortgage, pursuant to the third section of the act, does not render it invalid as against

purchasers or mortgagees intermediate the orignal filing and the omission to refile. The term subsequent in that section means after the time for refiling has elapsed.

Meech v. Patchin, 14 N. Y. 71.
Lattimer v. Wheeler, 30 Barb. 480.
Wray v. Fedderke, 11 Jones & Spencer, 338.
Manning v. Monaghan, 23 N. Y. 539.
Thompson v. Van Vechten, 6 Bosw. 375.
Shutter v. Ward, 16 N. Y. Week. Dig. 69.
Jaqueth v. Merritt, 29 Hun, 584.

A chattel mortgage given for a pre-existing indebtedness, although valid as between the parties, does not constitute the mortgagee a purchaser or incumbrancer in good faith, within the statute.

Tiffany v. Warren, 24 How. 293.
Zimmer v. Wheeler, 2 N. Y. St. Rep. 325; s. c., 41 Hun, 638.
Wood v. Robinson, 22 N. Y. 567.
Williams v. Shelly, 37 N. Y. 375.
Weaver v. Barden, 49 N. Y. 286.
Cary v. White, 52 N. Y. 138.
Van Huesen v. Radcliff, 72 N. Y. 580.
Jones v. Graham, 77 N. Y. 628.
Farrington v. Frankford Bank, 24 Barb. 554.
Ray v. Birdseye, 5 Den. 619.
Osborn v. Alexander, 40 Hun, 325.
Betsinger v. Schuyler, 46 Hun, 352.

The filing of a chattel mortgage is notice to a subsequent mortgagee whose mortgage is filed before the expiration of the year, but a purchaser under a sale made under such second mortgage, after the expiration of the year, gets good title, and the first mortgage is of no validity as against him if the mortgage be not refiled.

Dillingham v. Bolt, 37 N. Y. 198.
Marsden v. Cornell, 62 N. Y. 215.

Jaqueth v. Merritt, 29 Hun, 584.
Zoeller v. Riley, 100 N. Y. 103.

Estoppel.— A party accepting a transfer of personal property expressly subject to a mortgage held by another, is estopped from claiming a prior lien upon the property, by virtue of a previous mortgage not properly renewed.

Jones v. Howell, 3 Robt. 438. See
Horton v. Davis, 26 N. Y. 495.

CHAPTER III.

THE VALIDITY OF CHATTEL MORTGAGES.

I. Between the parties.
II. The controlling law as to validity.
III. Change of possession.
IV. What interests may be mortgaged.
V. Agreements which render the mortgage void.
VI. Agreements which do not invalidate the mortgage.
VII. Of mortgages upon fixtures.
VIII. How and by whom the validity may be contested.

I. Between the Parties.

A chattel mortgage can have no force or effect, unless it be given to secure a valid debt. It must have a legal inception. A chattel mortgage given for money knowingly advanced for the purpose of compounding a felony is void. So a mortgage given under duress is void.

Fellows v. Van Hyring, 23 How. 230.

So a chattel mortgage will be void if given to secure a debt tainted with usury.

Thompson v. Van Vechten, 27 N. Y. 568.

A chattel mortgage is valid as between the parties to it, although never filed.

Zimmer v. Wheeler, 41 Hun, 638.
Steward v. Cole, 43 Hun, 164.

So a chattel mortgage is valid, between the parties, which covers property to be acquired in the future.

Ludwig v. Kipp, 20 Hun, 265.

It is competent for parties to agree upon the sale and purchase of property, that the vendor shall retain a lien upon the property sold, as well as upon the article into which it shall be manufactured; and in such case a lien will attach upon the new article as soon as it comes into existence.

Dunning v. Stearns, 9 Barb. 630.

A chattel mortgage given to secure the present and future indebtedness of the mortgagor to the mortgagee, is valid as between the parties thereto, and when free from fraud, is valid as to creditors.

Brown v. Kiefer, 71 N. Y. 610.

As between mortgagor and mortgagee, personal chattels, which by being annexed to the freehold, would otherwise become a part of the realty, may by agreement, still be treated as personalty. And such arrangement will bind one claiming under the mortgagee. In equity, a merger never takes place contrary to the intention of the parties, or the requirements of justice.

Sheldon v. Edwards, 35 N. Y. 279.

The fraudulent acts of one mortgagee will not invalidate the mortgage, nor affect the rights of the other mortgagees.

Smith v. Post, 1 Hun, 518.

II. The Controlling Law as to Validity.

In this State it is held that where a contract in regard to personal property is made in another State, that the law of such State, as to its validity and effect, is to govern here, and if valid there, it is to be considered equally valid, and can be enforced here.

The principle is well settled, that a voluntary conveyance of personal property, good by the law of the place where it was made, passes title wherever the property may be situated.

Nichols v. Mase, 94 N. Y. 166. Citing
Ætna Ins. Co. v. Aldrich, 26 N. Y. 96.
Hoyt v. Thompson's Exr., 19 N. Y. 224.
Edgerly v. Bush, 81 N. Y. 203.

Though a transfer of personal property, valid by the law of the domicile, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated, and where a different law has been set up, when it is necessary, for the purpose of justice, that the actual *situs* of the property be examined.

Edgerly v. Bush, 81 N. Y. 204.

In that case the mortgagor and mortgagee were both residents of this State. The mortgagor removed to Lower Canada taking the mortgaged property with him. Afterward a regular dealer in horses there, sold the horses to one B., who immediately brought the property into this State. B. bought in good faith, in ignorance of the mortgage. Learning that there was a mortgage upon the team, to prevent their seizure he removed the team to Lower Canada, where they were sold to the defendant, who was a resident

of this State. But the property was not thereafter brought into this State. Plaintiff made a demand for the property, but defendant refused to deliver, and the plaintiff did not offer to reimburse defendant for the horses. Under the laws of Lower Canada, if an article of personal property lost or stolen, be sold in a fair or market or at a public sale, or purchased from a trader dealing in similar articles, the owner cannot reclaim it without reimbursing to the purchaser, the price paid by him for the property. Folger, C. J., delivering the opinion of the court, said: "It is plain that on no principle applicable to this case, could the sale of plaintiff's property by another, having no authority from him, and indeed to his wrong, be upheld save that it was authorized by the statute of Lower Canada; so that the question is one entirely of the comity to be shown by the courts of this State, to the enactments of another country. Those statutes not only enact the rule of market overt as it prevails in general in England, but carry it further, and make as in the city of London, every sale by a trader dealing in like articles as good as a sale at market overt. That rule does not obtain in this State. It has not been our policy to establish it. Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets good title.

"It would be to the contravention of that policy and to the inconvenience of our citizens, if we should give effect to these statutes of Lower Canada to the divesting of titles to movables lawfully acquired, and held by our general and statute law without the assent or intervention and against the will of the owner by our law. We doubt whether, in a case where after a title to property has been acquired by the law of the domicile of the vendor, and of the *situs* of the thing, and of the forum in which the parties stand, in a contest between citizens of the State of that forum, it has ever been adjudged, that such title has been divested by the surreptitious removal of the thing into another State, and a sale of it there under different laws."

The general rule that the voluntary transfer of personal

property, wherever situated, is to be governed by the law of the owner's domicile, always yields, when the law and the policy of the State where the property is actually located, have provided a different rule of transfer from that of the State where the owner lives.

Warner v. Jaffray, 96 N. Y. 248.
Edgerly v. Bush, 81 N. Y. 199.
Keller v. Paine, 107 N. Y. 89. Citing
4 Abb. Ct. App. Dec. 457.

The liability of property to be attached and sold under legal process, issuing from the courts of the State in which the property is actually situated, must be determined by the law of that State, rather than that of the jurisdiction where the owner lives.

Keller v. Paine, *supra.*

In that case, F., a resident of Pennsylvania, executed to plaintiff in that State, an instrument in form an absolute bill of sale, but in fact given as a chattel mortgage, on a canal boat owned by him then lying in the Erie canal in the town of G. F., in this State. An agent of the mortgagee filed a copy of the mortgage in the town clerk's office of said town, and went on board the boat and assumed possession thereof. Defendant, however, had previously on the same day, as sheriff, levied upon the boat by virtue of an attachment against F., and subsequently sold it on execution. The parties were all residents of the State of Pennsylvania. In an action for conversion of the boat, held that both under the provisions of the Revised Statutes relating to chattel mortgages, and the act in relation to liens on canal boats, (chapter 412, Laws of 1864), the instrument was void by reason of the failure to properly file the same, and plaintiffs were not entitled to recover.

The provisions of the Revised Statutes, relative to chattel mortgages, have no application to a mortgage executed in a

British province upon a British vessel. It is by the rules of the common law that the validity of such a mortgage must be determined.

Fairbanks v. Bloomfield, 5 Duer, 434.

III. Change of Possession.

The change of possession where the mortgage is not filed, must be open, actual, and public; constructive or legal change is insufficient.

Otis v. Sill, 8 Barb. 102.
Camp v. Camp, 2 Hill, 628.
Hanford v. Artcher, 4 Hill, 271.
Steele v. Benham, 84 N. Y. 634.
Crandall v. Brown, 18 Hun, 461.

The presumption of fraud, in case there is no actual change of possession, is conclusive under the statute unless the mortgage is duly filed. That presumption, however, is one which may be repelled by evidence, where the condition of filing has been complied with.

Frost v. Mott, 34 N. Y. 255.

As against an *attaching* creditor, a chattel mortgage is absolutely void, unless it, or a true copy thereof, is filed in the proper office. Or unless there was an immediate delivery of the property to the mortgagee, followed by an actual and continued change of possession.

Siedenbach v. Riley (Ct. ot App.), 20 N. Y. St. Rep. 124; s. c., 111 N. Y. 560.

Whether there was an actual and continued change of possession, is a question for the jury.

Ibid.
Ford v. Williams, 24 N. Y. 365.
Wood v. Lowry, 17 Wend. 492.
Stewart v. Slater, 6 Duer, 96.

A chattel mortgage is absolutely void as to creditors, unless the same is filed, or the possession of the property is changed.

Clark v. Gilbert, 14 Week. Dig. 241.

Where a mortgagee takes actual possession and control of the property, a failure thereafter to refile the mortgage is not sufficient to defeat his title and possession of the property.

Simmons v. Osgoodby, 16 Week. Dig. 428.

So a temporary resumption of the possession by a mortgagor, is a badge of fraud, although open to explanation.

Look v. Comstock, 15 Wend. 241.

Possession taken by the mortgagee under a chattel mortgage, which is fraudulent against creditors, by reason of an agreement permitting the mortgagor to deal in the property for his own benefit is of no avail. The mortgage is still fraudulent as against creditors.

Dutcher v. Swartwood, 15 Hun, 34.
Stimson v. Wrigley, 86 N. Y. 332.
Sperry v. Baldwin, 46 Hun, 120.
Quinn & Nolan Brewing Co. v. Hart, 48 Hun, 395.
Hauselt v. Harrison, 105 U. S. 401, distinguished.
Potts v. Hart, 99 N. Y. 168.

IV. What Interests may be Mortgaged.

In general it may be said that any property which is capable of absolute sale, may be mortgaged; but such property must have either an actual or potential existence, otherwise the mortgage will have no validity.

Van Hozer v. Cory, 34 Barb. 12.
Gardner v. McEwen, 19 N. Y. 123.
Farmers' Loan and Trust Co. v. The Long Beach Improvement Co., 27 Hun, 89.

A chattel mortgage, which, after enumerating the goods mortgaged, contained a clause in the following form, to-wit: "And also all other goods, chattels, etc., which may be substituted for any similar property now appertaining to the business of said firm, and belonging to said firm at said store and shop, and which may be added by way of purchase or exchange thereto, it being intended and declared that all the property, stock, tools and fixtures, which may at any time form part of, and belong to said business of said firm of T. & Co., at the premises aforesaid, whether the same be now in existence or hereafter created or acquired, shall be and is included in, covered and conveyed by the foregoing mortgage," is void as to creditors, on the ground that the mortgage could not cover the after-acquired property.

Carpenter v. Simmons, 28 How. 12.

A mortgage of the rights of a party of his interests in a lease of land, together with all the oil wells, machinery and structures thereon, and those to be placed thereon, if filed in the office of the proper town clerk, operates to give constructive notice of the lien created by the instrument, and such mortgage is valid, and is a lien upon wells subsequently put down by assignees of the lease.

Kribbs v. Alford, 9 N. Y. St. Rep. 617; s. c., 45 Hun, 589.

A grant of crops to be thereafter sown by the owner upon his land is valid, and the title thereto passes as soon as the crops come into existence.

Nestell v. Hewitt, 19 Abb. N. C. 287.
Andrew v. Newcomb, 32 N. Y. 417.

In the case of Andrew v. Newcomb, *supra*, Denio, C. J., said: "Crops to be raised, are an exception to the general rule, that the title to property not in existence cannot be affected, so as to vest the title when it comes into being. In

the case of crops to be sown, it vests potentially, from the time of the executory bargain and actually as soon as the subject arises."

A judgment debtor cannot make a valid mortgage after the appointment of a receiver, as the receiver is vested with all the title of the judgment debtor, and thereafter the judgment debtor has no interest which can be made the subject of a chattel mortgage.

Clark v. Gilbert, 10 Daly, 318.

A chattel mortgage, upon the merchandise and stock in trade of the mortgagor, expressed to include all "the increase and decrease thereof," is wholly void.

Mittnacht v. Kelly, 5 Abb. (N. S.) 442.

V. Agreements which Render the Mortgage Void.

An agreement that a mortgagor may continue in possession and sell the goods for cash or on credit, and the accounts, when sales are made on credit, to be transferred to the mortgagee and applied on the debt, the accounts, however, only when they shall be collected; held to be fraudulent and void as to creditors, and for the reason that this agreement, as to the accounts, enabled the mortgagor to sell his entire stock on credit, and keep his other creditors at bay.

City Bank of Rochester v. Westbury, 16 Hun, 458.

A chattel mortgage is fraudulent and void as to creditors, where it was given with a tacit or express understanding and arrangement, that the mortgagor may sell and dispose of the mortgaged property, and apply the avails to his own use.

Such an agreement may be inferred from the fact that the mortgagor does, with the knowledge and assent of the

mortgagee, so sell and dispose of the property and apply the avails.

Griswold v. Sheldon, 4 N. Y. 581.
Edgell v. Hart, 9 N. Y. 213.
Ford v. Williams, 13 N. Y. 577.
Russell v. Winne, 37 N. Y. 595.
Brackett v. Harvey, 91 N. Y. 214.
Potts v. Hart, 99 N. Y. 168.

Sales made and the moneys used by the mortgagor, and with the knowledge and consent of the mortgagee, renders the mortgage void.

Williston v. Jones, 6 Duer, 507.

Where property embraced in a chattel mortgage, is left in the possession of the mortgagor, pursuant to an agreement between him and the mortgagee, made at the time, that he may go on with it and sell it so as to support his wife and children, the mortgage is, by reason of the agreement, fraudulent and void.

Marsden v. Vultee, 8 Bosw. 129.

A chattel mortgage given by a person in embarrassed circumstances, although given for value, will be fraudulent and void as against creditors, when it is made with the design to defraud creditors, and the mortgagee knows that fact.

Anderson v. Hann, 1 Week. Dig. 367.

To render a chattel mortgage void under the statute, it is only necessary that it should be designed to delay a single creditor for a single day, in the collection of his debts.

It is sufficient to vitiate the mortgage that such a design contaminated it, though mingled with other purposes.

Manning v. Reilly, 16 Week. Dig. 428.

Fraud on the part of the mortgagor does not affect the mortgagee unless he was a party or privy to it, and received the mortgage with intent to hinder, delay or defraud creditors, or had notice of the fraudulent intent of the mortgagor.

Murphy v. Moore, 23 Hun, 95.

If the mortgage be fraudulent, no subsequent act of the mortgagee can make it valid.

Dutcher v. Swartwood, 15 Hun, 34.

An agreement between the mortgagor and mortgagee of chattels, that the former may retain possession and sell the goods, and pay the proceeds over to the mortgagee, will not render the mortgage fraudulent *per se;* under such an agreement the *bona fides* of the transaction become a question of fact for the jury.

Dolson v. Saxton, 5 Week. Dig. 126.

After default in the payment of a mortgage, the mortgagor cannot thereafter charge the property by a second mortgage. A subsequent mortgagee would take no interest in the property, and would have no right to redeem by offering to pay the first mortgage.

Taylor v. Walter, 34 How. 385.
Porter v. Parmley, 43 How. 445; s.c. 52 N. Y. 185.

Where at the time of the execution of a chattel mortgage upon a stock of merchandise, it is understood and agreed that the mortgagor may go on and sell the stock, and use the proceeds generally in his business, and the agreement is carried out by permitted sales, the transaction is fraudulent in law as against the creditors of the mortgagor.

Southard v. Benner, 72 N. Y. 424.

VI. Agreements which do not Invalidate the Mortgage.

A mortgage is not fraudulent in law, from the mere fact of its expressing a greater sum secured than the real amount of the debt, which the mortgagor owes to the mortgagee.

A conveyance or assignment by a debtor of his personal property upon trust, to sell and pay his debts to one or more creditors, with a reservation to himself of any surplus there may be, is in effect a mortgage, and if made to a creditor, is valid.

Leitch v. Hollister, 4 N. Y. 211.
Dunham v. Whitehead, 21 N. Y. 131.
Brown v. Gutherie, 110 N. Y. 442.

The mere fact that a mortgagor is insolvent at the time of the execution of a mortgage, is not sufficient to vitiate it.

Manchester v. Tibbetts, 19 N. Y. St. Rep. 302.

A provision in a chattel mortgage, that the mortgagor may retain possession until the mortgagee deems himself insecure, is valid.

Frost v. Mott, 34 N. Y. 255.

If a mortgage cover unfinished articles of manufacture, and the mortgagor afterward adds labor and materials to them, the mortgage covers the finished articles, both as against the mortgagor and his creditors.

Dunning v. Stearns, 9 Barb. 630.
Frost v. Willard, 9 Barb. 440.

A chattel mortgage covering property then owned by the mortgagor, and also property to be subsequently acquired by the mortgagor, does not render invalid a mortgage upon the property then owned by him.

Gardner v. McEwen, 19 N. Y. 123.
Van Heusen v. Radcliff, 17 N. Y. 580.

A chattel mortgage given by persons in possession of property, although not the owners, but with the knowledge and assent of the owners, is valid and binding upon such owners.

Hayman v. Jones, 3 Week. Dig. 230.

Where a mortgagor, after the delivery of the mortgage, gives his promissory note for the debt, the acceptance of such note by the mortgagee is not a waiver of the mortgage security.

A creditor has a right to take as many securities as his debtor is willing to give.

Wescott v. Gunn, 4 Duer, 107.

An agreement in a chattel mortgage that the mortgagor will keep the property insured, and assign the policy to the mortgagee as collateral security, and if he does not do so, that the mortgagee may insure and add to the mortgage, is valid.

Baltes v. Dobin, 67 Barb. 433.

A clause in a chattel mortgage, upon a stock of goods, which purports to extend the lien of the mortgage over after-acquired property, does not render the mortgage absolutely void; where there is no arrangement, permitting the mortgagor to deal with the goods mortgaged, and no knowledge of such dealing on the part of the mortgagee, and the absence of any intent to defraud creditors is affirmatively found.

Yates v. Olmstead, 56 N. Y. 632. This case is qualified by the case of Brackett v. Harvey, *post.*

A chattel mortgage is not rendered void as to creditors of the mortgagor, by a provision authorizing him to sell the mortgaged property, and apply the proceeds of sales toward the payment of the mortgage debt; nor does an authority to the mortgagor to sell on credit, taking good business

paper, which the mortgagee agrees to accept and apply on the debt, affect the validity of the mortgage. So also, permission to use a portion of the proceeds of sales to purchase other property does not vitiate the mortgage, where it is coupled with a condition that the property so purchased shall be brought in and subjected to the mortgage lien by a renewal of the mortgage.

Brackett v. Harvey, 91 N. Y. 214.

A chattel mortgage made the debt payable as follows: "The said principal sum and interest to be paid immediately after the expiration of five years from date, except in case default should be made in the performance of the conditions of a certain agreement this day executed by," etc. This agreement provided that the debt should be paid in monthly installments of $50 each; *held*, that the mortgage was not invalidated by the failure to record or file the agreement referred to.

Shuler v. Boutwell, 18 Hun, 171.

A lease which provides that the landlord may have a lien upon the fixtures, etc., for any rent unpaid, is valid as between the parties, and the landlord may maintain an action against the mortgagor to recover the same, when taken from the premises by him.

Whited v. Hamilton, 15 Hun, 275.

Hop poles used in the raising of hops upon a farm, are covered by a mortgage of the land, whether they are upon the farm at the time of giving the mortgage, or are subsequently brought thereon.

Sullivan v. Toole, 26 Hun, 203. Citing
Gardiner v. Finly, 19 Barb. 317.
Rice v. Dewey, 54 Barb. 455.

In the case of *Hawkins* v. *Giles*, 45 Hun, 318, the defendant leased to one C. a farm and seven cows from April 1, 1883, to April 1, 1884, and agreed to furnish sufficient hay to keep the cows to grass in 1883. C. agreed to pay $175 rent and "to feed out all the fodder on said farm that is raised on said farm, * * * and winter said stock (seven cows) through to grass in the spring of 1884 on hay."

In December, 1883, the plaintiff had an execution against C. under which about twenty-five tons of the hay grown upon the farm in 1883 was sold, the plaintiff becoming the purchaser. The defendant prevented the plaintiff from removing the hay, claiming that C. had left the farm without fully paying the rent; that the hay was required to keep the cows through to grass. *Held*, that the title to the hay was in C. (the tenant) and was subject to sale on the execution against him, and that the plaintiff was entitled to recover its value from the defendant. Citing.

Johnson v. Crofoot, 53 Barb. 574.
Steffin v. Steffin, 4 N. Y. Civ. Pro. Rep. 179.
McCombs v. Becker, 3 Hun, 342.

An agreement in a lease of farm premises, that the title to personal property belonging to the lessee, shall vest in the lessor as security for the rent, is valid, and is enforceable against crops subsequently raised on the farm; a purchaser of such crops is chargeable with notice of the lessor's title when the lease is filed in the proper town clerk's office.

Smith v. Taber, 46 Hun, 313.

In this case, the lease in question was made February 18, 1885, and was filed in the town clerk's office with chattel mortgages July 24, 1885. In November or December, 1885, the defendant, T., purchased the buckwheat sown on the farm in June or July of 1885, of B., without actual notice of S.'s claim at the market value for cash paid at the time. The "lien clause" in the lease is as follows: "He (the tenant, B.) also agrees that all the personal property on said land, or

hereafter brought on, shall be and the same hereby is, bound to said S. (the landlord) for the faithful performance of all the covenants contained in this lease, and as collateral security for all the rent due and to become due for said land, and for any and all sums now and hereafter to be due or owing from said B. to said S.; and said B. also agrees that all said personal property and the crops raised and to be raised on said land, and the cows and all the increase thereof, shall be bound, and hereby are bound to said S. as collateral security for the faithful performance of all the covenants contained in this lease, and for the payment of said rent due and to become due and owing from said B. to S. for any cause whatever, and for this purpose said S. shall have the title to all the personal property of whatever kind raised, made, produced, kept, put or used upon said farm, and he shall have the right of possession thereof at any time, and such title and right of possession is vested in said S. as collateral security for the faithful performance of all the covenants contained in this lease, including the payment of rent due, and any and all sums of money owing to or to be hereafter due and owing from said B. to said S."

Hardin, P. J., in delivering the opinion of the court, said: "It must be assumed that the contract between the plaintiff and his lessee was valid whether viewed exclusively as a chattel mortgage, or as containing a 'lien clause' to enable the plaintiff to enforce the payment of the rent out of any property of the tenant in and upon the premises. Treating the filing of the lease containing the 'lien clause' and the security clause vesting the title to the property in the lessor, as equivalent to an actual notice to the defendant, then it must follow that the defendant is not a purchaser in good faith without notice; and hence he acquired only such rights as were possessed by his vendor, as between the vendor and the lessor. Here the defendant had constructive notice through the notice filed in the proper town clerk's office; here it was stipulated that it should vest in S. (the lessor) and as soon as it came into existence S. had the right to it as it was vested in him to the extent that it was

needed to secure or pay his debt, and that stipulation was valid. The language is apt and broad enough to create a present lien as well as a present transfer of title to all property mentioned." Citing

McCaffrey v. Woodin, 65 N. Y. 459.
Hale v. The Omaha Nat. Bank, 49 N. Y. 634.
Andrew v. Newcomb, 32 N. Y. 417.
Reynolds v. Ellis, 103 N. Y. 122.
Stevens v. Watson, 4 Abb. App. Cas. 302.
Johnson v. Crofoot, 53 Barb. 576.
Farmers' Loan & T. Co. v. Long B. Imp. Co., 27 Hun, 91.
Conderman v. Smith, 41 Barb. 404.
Jones on Mortgages, 115.
Harmon on Chattel Mortgages, 44.
Hawkins v. Giles, 45 Hun, 318.
Dresser v. United F. Ins. Co., 45 Hun, 302.
Betsinger v. Schuyler, 46 Hun, 348.

In the case last cited, *Betsinger* v. *Schuyler*, a farm lease contained the following provision: "That the party of the second part shall and will during the continuance of the term, feed out upon said premises all hay, straw, cornstalks and fodder, that may be raised or produced on said premises or any part thereof, * * * that all the products of the farm herein demised, and of the live stock stipulated to be kept thereon, that shall be raised or made thereon in each year during the continuance of the term, shall be and remain the property of the party of the first part, * * * until the rent of such year shall have been fully paid; and that the party of the second part, * * * shall have no right to sell or dispose of any such products, but shall hold and possess the same simply as the agent of the party of the first part, * * * and not otherwise, until such rent shall have been fully paid." *Held* (Follett, J., dissenting), that this provision was, in effect, a chattel mortgage; and that as the lease had not been filed in the town clerk's office, it was void as to subsequent mortgagees in good faith.

In the case of *Brown* v. *Guthrie*, 110 N. Y. 435, one M. and defendant entered into a contract by which it was agreed that, in consideration of M.'s executing to defendant his notes for $2,400, secured by a chattel mortgage on all his goods and chattels, defendant would cancel certain notes held by him against M. amounting to $980.78; loan him $600 and pay debts of his to the amount of $619.21, to such creditors as M. should thereafter designate. It was also agreed, M., as the agent of the plaintiff, should be allowed to sell at public auction the goods on credit, defendant to receive all cash payments and notes taken on such sale, retain out of the same the amount of M.'s notes, and pay over to him any surplus; defendant to be allowed $200 for his services. As part of the same transaction, M. executed the notes and chattel mortgage, which, however, did not cover all his personal property, and defendant cancelled the notes held by him; the creditors of M., to whom the payment was to be made were also designated. Defendant subsequently advanced $600 and paid the debts as agreed.

Plaintiff O'M., as sheriff, under an attachment in an action by plaintiff B. against M., levied on the mortgaged property. Defendant thereupon took and sold the same under his mortgage. In an action for an alleged conversion, the referee found that there was no fraud, in fact, as against M.'s creditors in the transaction. *Held*, that it was not fraudulent as matter of law, and the action was not maintainable; that said transaction could not be considered as a general assignment by an insolvent debtor, and so void because it reserved to him a possible surplus at the expense of unpaid creditors and a right to subsequently make preferences; as it had none of the elements of a trust, but was simply a transfer by chattel mortgage, the consideration for which was evidenced and settled by the outside agreement; that the provision for a sale on credit was made harmless by the stipulation that defendant should take the credits as cash.

The material and essential characteristic of a general assignment, is the presence of a trust, the assignee taking title,

not as absolute owner, but merely as trustee for the performance of trust duties.

A provision in a chattel mortgage, giving a mortgagor the privilege to sell the property mortgaged for cash, or on credit, the mortgagor to apply the proceeds of such sales upon the debt secured by said mortgage, and also giving to the mortgagor the right to replenish said stock, the stock so purchased to be applied upon said mortgage is not *per se* fraudulent as against the creditors of the mortgagor.

The relation in such case given to the mortgagor, and taken by him, is that of agency for the mortgagee, in making the sales, and may be so treated as against the creditors of the mortgagor.

Kerr v. Dildine, 6 N. Y. St. Rep. 163. Citing
Brackett v. Harvey, 91 N. Y. 214.
Simis v. Hodge, 21 N. Y. St. Rep. 955.

Where the mortgagor is given permission to sell the goods for cash and pay the proceeds over to the mortgagee, the funds become at once the funds of the mortgagee, and the law applies the same upon the mortgagee's indebtedness, whether the same is ever paid over to the mortgagee or not.

Smith v. Cooper, 27 Hun, 567.
Ellsworth v. Phelps, 30 Hun, 646.
Potts v. Hart, 99 N. Y. 168.
Preston v. Southwick, 42 Hun, 293.
Sperry v. Baldwin, 46 Hun, 120.

Where a mortgagor mixes articles covered by a mortgage with those subsequently acquired, so that they cannot be distinguished, such confusion of property does not render the mortgage invalid as to such articles as can be identified.

Caring v. Richmond, 28 Hun, 25.

Where an agreement is made that the mortgagor may sell mortgaged goods, and apply the proceeds, upon the mortgage, a subsequent judgment debtor is entitled to an accounting

of such sales, and to have the amount applied to reduce the mortgage debt.

Ellsworth v. Phelps, *supra.*

A chattel mortgage duly filed, is valid as against a livery stable keeper, for the board of a horse, until after he shall serve the notice required by chapter 498, Laws of 1872.

Jackson v. Kasseall, 30 Hun, 231.
See chapter 145, Laws of 1880.
See Corning v. Ashley, 21 N. Y. St. Rep. 703.

A chattel mortgage is valid, which provides that the mortgagor of articles purchased, might manufacture such articles, and sell the same, and turn the proceeds over to the mortgagee.

Caring v. Richmond, 22 Hun, 369.

When a purchaser has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed, either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence, equally fatal to his claim to be considered a *bona fide* purchaser. The presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of due diligence on his part.

Williamson v. Brown, 15 N. Y. 354.
Mack v. Phelan, 92 N. Y. 25.

Merger. — A chattel mortgage given as collateral security for the payment of a note, is not merged or extinguished, by a judgment entered upon said note. The debt is not yet satisfied.

The note may have been cancelled, but the debt was not; and until that is done, it seems that all collateral securities,

whether upon real or personal property, should be allowed to stand.

Butler v. Miller, 1 N. Y. 496.
Hill v. Beebe, 13 N. Y. 556.
Carpenter v. Longan, 16 Wall. 271.

Nor does it affect the right of the indorsee to enforce the mortgage or deed of trust security, that the note has been merged in a judgment; so long as the judgment remains unsatisfied, the debt is unpaid and the principal remaining, the mortgage lien is not merged, but is transferred from the note to the judgment.

Ober v. Gallagher, 93 U. S. 199.
Colebrooke on Collateral Securities, 198.

VII. Of Mortgages upon Fixtures.

Fixtures are articles which have an existence independent of a freehold and are afterward annexed to, and become a part of it.

Hamilton v. Austin, 36 Hun, 142.

There are several tests that will aid in the determination of the question as to what are fixtures. As to machinery, the tests to be applied are, whether the annexation of the property to the freehold is of a permanent character. Another is adaptability to the use of the freehold.

And yet another, is the intention of the party at the time of making the annexation.

Phœnix Mills v. Miller, 4 N. Y. St. Rep. 787; s. c., 42 Hun, 654. Citing
Potter v. Cromwell, 40 N. Y. 287.
Voorhees v. McGinnis, 48 N. Y. 282.

Mere intention to make an article a fixture, without annexation to the realty, will not make it one; but when such in-

tention does exist in the mind of the owner of the land and of the article, then the slightest affixing will make it a part of the freehold; such intention often becomes the controlling fact in determining the question whether in law, the article in dispute is, or is not, a fixture.

Hart v. Sheldon, 34 Hun, 38.

Between vendor and vendee, the mode of annexation is not the controlling test. The purpose of the annexation, and the intent with which it was made, is, in such cases, the most important consideration. The permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached, as upon the motive and intention of the party in attaching it. If the article is attached for temporary use, with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor.

If it is placed there for the permanent improvement of the freehold, he may.

McRea v. Central Nat. Bank of Troy, 66 N. Y. 495.

The courts of this State accord great efficiency to a mortgagor's agreement, that articles which by attachment would become fixtures, shall remain chattels so as to give effect to a chattel mortgage of them, as against subsequent mortgagees and purchasers of the land. They even hold that a chattel mortgage executed in view that the chattels are about to be annexed to the realty, is sufficient evidence of the intention and agreement of the parties, that they are to retain their character as personal property.

Ford v. Cobb, 20 N. Y. 344.
Sisson v. Hibbard, 75 N. Y. 542.
Kinsey v. Bailey, 9 Hun, 452.

If a chattel mortgage be executed before the mortgage on the land, the mortgagee of the land having notice of the

prior incumbrance, the act of the parties in treating the property as personal, would as between them, make it so.

Griffin v. Allen, not reported, but cited in Clinton's Digest.

Where an engine was built for a mill, and before it left the owner's shop, a mortgage was taken on it, with a stipulation that it might be removed at any time, it was held that the engine continued to be personal property, as against a previous mortgage of the land.

Tifft v. Horton, 53 N. Y. 377.

In the case of *Tifft* v. *Horton*, plaintiff sold to B. an engine and boiler to be put up in an elevator owned by the latter. Notes were given for a portion of the purchase-money, secured by a chattel mortgage upon the property sold, executed before delivery, which mortgage contained a clause stating that the engine and boiler should be and remain personal property until the notes were paid, notwithstanding the manner in which they should be placed in the elevator; and in case of failure to pay, plaintiff was authorized to enter the elevator and remove them. They were placed upon a foundation outside of the elevator and an engine house built over them. Upon foreclosure of mortgages upon the premises executed before this purchase, defendant became the purchaser.

The notes not being paid at maturity, plaintiff demanded the engine and boiler, and upon refusal of defendant to deliver, brought this action for conversion. It was stipulated between the parties that the sale on foreclosure should not, in any manner, change the legal rights of the plaintiff.

Held, that defendant acquired no lien on the property in question by virtue of the mortgage, and that plaintiff was entitled to reeover.

If personal property, such as machinery already subject to a chattel mortgage, be affixed to the realty, with the assent of the mortgagee, it becomes a question whether the chattel mortgage lien is lost as against an existing mortgagee of the realty, or as against subsequent purchasers and mortgagees of the realty, or creditors who subsequently obtain liens upon it. The intention and agreement of the parties has much to do with the determination of the question, whether chattels annexed to the realty retain their character as personal property.

Sheldon v. Edwards, 35 N. Y. 279.
Potter v. Cromwell, 40 N. Y. 287.

In the case of *Sisson* v. *Hibbard*, *supra*, an engine and boiler were sold to one H., the vendors taking thereon a chattel mortgage to secure the purchase-price. At the time of the execution of the mortgage, it was mutually agreed that the mortgage should be valid, notwithstanding any annexation to the premises. Default having been made in the payment of the mortgage, H. re-transferred the engine and boiler to the vendors; but they permitted the same to remain on the premises. The premises were sold upon an execution against H.; it was held, that the engine and boiler remained personal property.

Machinery of a cotton mill, merely fastened to the floor by nails or screws, or held in position by cleats, to keep it in position is not a part of the realty, and would pass by a chattel mortgage.

Godard v. Gould, 14 Barb. 662.
McEntee v. Scott, 2 Thompson & Cook, 284.

A less stringent rule obtains between landlord and tenant than between grantor and grantee. The law presumes in the case of a tenant, that his interest is temporary only, and that he affixes only for his own enjoyment during his term, and not to enhance the value of the estate; hence it permits annexations made by him to be detached during his

term, if done without injury to the freehold, and in agreement with known usages.

Livingston v. Sulzer, 19 Hun, 380.
Tifft v. Horton, *supra.*

Where chattels are annexed to the real estate, with the intent that they shall not thereby become a part of the freehold, as a general rule, such intent will control; to preserve their character as personalty, a concurrent intent on the part of a prior mortgagee of the real estate is not necessary, and neither a prior or a subsequent mortgagee of the land can claim as subject to the lien of his mortgage, chattels brought on or affixed to the land under an agreement between the owner of the fee and the owner of the chattels, that the character of the latter as personal property is not to be changed, and that they are subject to a right of the owner to remove them.

Tifft v. Horton, *supra.*

The owner of land may reimpress the character of personalty on chattels, which by annexation to the land have become fixtures, according to the ordinary rule, provided only that they have not been so incorporated, as to lose their identity; the reconversion does not interfere with the rights of creditors or third persons.

Tyson v. Post, 108 N. Y. 221.

But by agreement for the purpose of protecting the rights of vendors of personalty, or of creditors, chattels may retain their character as chattels, notwithstanding their annexation to the land in such a way, as in the absence of an agreement, would constitute them fixtures.

Ibid.

Chairs fastened to a floor, by iron screws 2½ inches in length, are not deprived of their character as personal prop-

erty as between the parties, and a mortgage given thereon to secure the manufacturer is valid.

Metropolitan Concert Co. v. Sperry, 9 N. Y. St. Rep. 342; s. c., 44 Hun, 630. Citing
Husted v. Ingraham, 75 N. Y. 251.

Looms in a woolen factory connected with the motive power by leather bands, and not otherwise annexed to the building, than by screws holding them to the floor, which keep them steady while working, and which could be removed without injury to the freehold, are chattels.

Murdock v. Gifford, 18 N. Y. 28.

The question of fixtures is generally one of intention.

McLaughlin v. Lester, 4 N. Y. St. Rep. 852; s. c., 42 Hun, 657.

A mortgage executed upon real estate, which premises were used as a flouring mill, and which covered, "appendages of every description now used in and about the same," *held*, that certain articles in the mill, viz.: weighing scales, scoops, mill picks, and a small hand cornsheller, were covered by the mortgage under the term *appendages*.

Miller v. Hart, 32 Hun, 639.

VIII. How and by Whom the Validity may be Contested.

If an execution creditor desires to contest the validity of a mortgage, he may treat it as a nullity, and indemnify the sheriff and let the mortgagee bring an action against the sheriff for the value of the property, or to reclaim its possession, and in such action the mortgagee will succeed in case the mortgage is declared to be fraudulent.

Rinchey v. Stryker (Ct. App.), 26 How. 75.
Delaware v. Ensign, 21 Barb. 85.
Frost v. Mott, 34 N. Y. 452.

An assignee in bankruptcy may assert the invalidity of a mortgage, and by reason of omission to file, or by reason of the mortgagor's being allowed to deal with it.

Brackett v. Harvey, 91 N. Y. 214.

An action to set aside a mortgage as fraudulent, may be maintained by a subsequent mortgagee of the same property, and in such an action, either legal or equitable relief may be given as the proofs on the trial, and the allegations in the complaint demand.

Anderson v. Hunn, 5 Hun, 79.

So also a partner, has such a lien on the partnership property, as entitles him to a judgment setting aside fraudulent sales or incumbrances made by his copartner.

Wade v. Rusher, 4 Bosw. 537.

A *bona fide* purchaser of mortgaged property, without notice of the lien, may also show its fraudulent character.

Thomas on Mortgages, 490.

A plaintiff in a judgment and execution, who purchases merely the interests of the defendants in the property, sold on the execution, is not estopped from questioning the validity of a prior chattel mortgage given by the defendants on such property.

Carpenter v. Simmons, 28 How. 12.

The general creditors of a mortgagor of chattels, have no right to assail a mortgage, or other conveyance of property

made by him, as invalid, until they have secured a lien thereon by levy under a judgment and execution, or by some other method acquired a legal or equitable interest in the property.

Southard v. Benner, 72 N. Y. 424.
Reynolds v. Ellis, 103 N. Y. 123.
Sullivan v. Miller, 106 N. Y. 641.

A creditor who seeks to impeach a chattel mortgage, upon the ground of the continuance in possession of the mortgagor, is bound to show he was a creditor during the time that the possession continued.

Williston v. Jones, 6 Duer, 504.

An action may be maintained to set aside a chattel mortgage as fraudulent, by an assignee for the benefit of creditors or other trustee.

Hangen v. Hachmeister, 53 N. Y. Supr. Ct. 533.
Southard v. Benner, 72 N. Y. 424.
Reynolds v. Ellis, 103 N. Y. 123.

A purchaser of property under an execution, may attack a previous usurious lien thereon.

Knickerbocker Ins. Co. v. Hill, 3 Hun, 577. Citing
Cavan v. Kelly, 3 Alb. L. J. 373.
Dix v. Van Wyck, 2 Hill, 522.
Thompson v. Van Vetchen, 27 N. Y. 568.

Purchasers under an execution sale, may set up any defense to a lien prior to that under which the execution sale was had.

Nichols v. Iremonger, 3 Hun, 609.

CHAPTER IV.

OF THE DISPOSITION AND SALE OF THE MORTGAGED PROPERTY.

I. Under execution.
II. By the mortgagor.
III. By the mortgagor's agent.
IV. By the mortgagee.

I. Under Execution.

It is well settled, that under our statutes, a mortgagor of goods has no property in them subject to levy and sale on execution, unless he has a right to the possession for a definite time; and that a mortgagor in possession of the chattels after forfeiture, and when the mortgagee may take possession at his pleasure, has no right which is subject to sale on execution. It is equally well settled that a mortgagor of chattels in possession with the right of possession for a definite period, has an interest which may be sold on execution.

Goulet v. Asseler, 22 N. Y. 228.
Hall v. Samson, 19 How. 481.
Rodman v. Hendricks, 1 Sandf. 32.

Where, by the terms of a chattel mortgage, the mortgagee has an immediate right of possession, the property cannot be levied upon and sold under an execution against the mortgagor. A mere chose in action, which, unless united to a right of possession for a definite period, can never be the subject of a levy and sale under execution.

Hull v. Carnley, 11 N. Y. 501.

A mortgage of personal property, in all cases, vests the legal title in the mortgagee, and when by the terms of the

mortgage, he has an immediate right to the possession, although the possession may not have been changed, he is, in law, the absolute owner; and it is merely as his bailee, and by his sufferance, that the mortgagor retains the possession.

The latter has no interest that is bound by or can be sold under execution.

Stewart v. Slater, 6 Duer, 96.

While personal property, covered by a chattel mortgage, remains in the possession of the mortgagor, and its conditions are unbroken, the mortgagor's interest is subject to levy and sale upon execution, and the purchaser obtains the same title as that of which the mortgagor was possessed.

Hamill v. Gillispie, 48 N. Y. 556.

Where a chattel mortgage contains a provision authorizing the mortgagee at any time before default, if he should deem himself insecure, to take possession and sell, this gives the mortgagor the right of possession in the meantime, and until the mortgagee exercises such power, the right of possession remains in the mortgagor, and his right, title and interest, may be levied upon by virtue of an attachment; but if before judgment, in the attachment suit, the mortgagor exercises his right of taking possession, the possessory right of the mortgagor terminates, and the authority of the sheriff ends with the interest of the debtor. The property cannot be subsequently sold under an execution in the attachment suit.

Hall v. Samson, 35 N. Y. 274. Reversing 23 How. 84.
Rich v. Milk, 20 Barb. 616.
Chadwick v. Lamb, 29 How. 518.

The interest of a mortgagor in possession, under a chattel mortgage payable on demand, until such demand is made,

is to be deemed an interest for a definite period, and, therefore, subject to a levy under execution against such mortgagor.

Livor v. Orser, 5 Duer, 501.
Hathaway v. Brayman, 42 N. Y. 322.
Lyman v. Bowe, 66 How. 481; s. c., 5 N. Y. Civ. Pro. Rep. 157.

The interest of a mortgagor of personal property, even before forfeiture, where he has not the right of possession for a definite period, is but a right of redemption merely, which is not the subject of levy and sale upon execution.

Mattison v. Baucus, 1 N. Y. 295.

The possessory right, before default, can be sold under *attachment* as well as under execution.

Fairbanks v. Bloomfield, 5 Duer, 434.

It is well settled, that after a mortgagee of chattels has taken possession of the mortgaged property, by virtue of a power in the mortgage, the mortgagor has no remaining interest in it which can be seized and sold under execution, although the mortgage debt is not due.

Nichols v. Mead, 2 Lans. 223.
Hale v. Sweet, 40 N. Y. 103.
Porter v. Parmley, 52 N. Y. 188.
Powers v. Elias, 1 N. Y. St. Rep. 248.

A sale by the sheriff of the entire property, without mentioning any mortgage, conveys a title subject to the mortgage, if the mortgage be a valid lien.

Porter v. Parmley, *supra*.
White v. Cole, 24 Wend. 117.

Where one bids off property of a judgment debtor, at sheriff's sale, embraced in a chattel mortgage previously exe-

cuted by such debtor, the sale being subject to such mortgage, and subsequently purchases and takes an assignment of the mortgage, this will not operate as a payment of the mortgage, and if the mortgage has not been paid or foreclosed, nor any power contained in it exercised at the time of its transfer, it will be a valid, subsisting, unsatisfied mortgage, and no fraud can be imputed to the assignee in representing and claiming that it is unpaid.

Brown v. Rich, 40 Barb. 28.

Property in the possession of the mortgagor, even after default, may be levied upon and sold under a tax warrant.

Hersee v. Porter, 100 N. Y. 403.

In an action against a sheriff, for goods taken on execution, where the plaintiff claimed under a prior mortgage executed by the judgment debtor, *held*, that the sheriff might show the mortgage as usurious as a defense to the action.

Dix v. Van Wyck, 2 Hill, 572.

Upon default of the mortgagor to pay the mortgage debt, the mortgagee becomes the absolute owner of the mortgaged chattels, and in the absence of any special agreement changing the relation, the possession of the mortgagor after that time is that of mere naked bailee.

Hersee v. Porter, 100 N. Y. 408.

A sheriff taking possession of mortgaged chattels under execution, must sell the same in mass, and subject to the lien; the property cannot be sold and scattered all over the country in hostility to the lien of the mortgage.

Manning v. Monaghan, 23 N. Y. 545.

In this case, Comstock, C. J., in delivering the opinion of the court, said: "The property was dispersed in every direction as effectually beyond the plaintiff's reach, as if it had been thrown into the sea. It would seem too plain for discussion that all persons knowingly instrumental in the wrong, ought to be answerable for every wrong attended with loss and damage. The existence of a mortgage upon personal estate may not prevent creditors from seizing and selling it to satisfy their just demands. But an attempt to sell in contravention of the lien, is an attempt to do a wrong and inflict a loss."

"An actual injury may or may not result, according to the circumstances. If it does result, the logical consequence is, that an action will lie founded on the special facts." In this case the mortgage covered certain household furniture. A receiver was appointed under a judgment against the mortgagor, who caused the mortgaged goods to be sold at auction. The goods were bid off by different persons, in parcels, and scattered beyond the reach of the mortgagee.

Where personal property consisting of several articles is sold on *fi. fa.*, subject to a chattel mortgage, the whole ought to be sold in one parcel.

Tifft v. Barton, 4 Denio, 171.

II. By the Mortgagor.

Section 571 of the Penal Code provides as follows:

"A person who, having theretofore executed a mortgage of personal property, or any instrument intended to operate as such, sells, assigns, exchanges, secrets or otherwise disposes of any part of the property, upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee, or a purchaser thereof, is guilty of a misdemeanor."

3 Revised Statutes, 978, chapter 73.
Laws of 1871, chapter 77.

While mortgaged property remains in the possession of the mortgagor, and the condition of the mortgage is unbroken, he has an interest subject to his control and disposition.

He can sell and deliver such title as remains in him.

The purchaser will, in that case, take title subject to the lien of the mortgage, whether its existence was ascertained by the purchaser or not, or whether the mortgagor mentions or omitted to mention it.

Hamill v. Gillespie, 48 N. Y. 559.

Where a mortgagor causes the goods, subject to the chattel mortgage, to be sold before it becomes due, in parcels to various purchasers, and delivers them accordingly not subject to the mortgage, but in hostility to it, the auctioneer who makes the sale is liable in damages to the mortgagee.

Tarbel v. Bradley, 7 Abb. N. C. 286.

An agreement that the mortgagor may dispose of the goods for cash and bring the money to the mortgagee, the latter holding the title until such disposition shall be made, may possibly be sincere and without fraud. The law does not, therefore, condemn it absolutely, but submits the question of good faith to the jury.

Ford v. Williams, 24 N. Y. 365.

Where property is left with the mortgagor, and he disposes of it as his own, it is fraudulent.

Divver v. McLaughlin, 2 Wend. 596.
McLachlan v. Wright, 3 Wend. 348.

III. By the Morgagor's Agent.

Where the mortgagor of chattels, in possession after default in the payment of the mortgage debt, fraudulently

delivered them to a third person for sale, representing that they were his property, and the third person as agent for the mortgagor, sells the chattels, such third person is liable to the mortgagee for the value thereof, notwithstanding he acted in good faith, believing that the chattels were the property of the mortgagor, and paid the proceeds of the sale which he made, over to the mortgagor, without reward for his services. The agent in a fraudulent disposition of the property of another — not being money or negotiable paper — is liable therefor to the owner, although he acted in good faith, without interest or reward, and in the belief that his principal is the owner.

He who intermeddles with personal property, not his own, must see to it that he is protected by the authority of one who is himself by ownership, or otherwise, clothed with the authority he attempts to confer.

Dudley v. Hawley, 39 N. Y. 441. Citing
Anderson v. Nicholas, 5 Bosw. 130.
Everett v. Coffin, 6 Wend. 609.
Spencer v. Blackman, 6 Wend. 167.
Williams v. Merle, 11 Wend. 80.

Whoever deals with an agent, constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power. If the owner loses his property, or if it is sold or pledged without his consent, by one who has a qualified possession of it for a specific purpose, the owner can follow and claim it in the hands of any person however innocent.

Wooster v. Sherwood, 25 N. Y. 287. Citing
2 Kent's Com. 621.
Saltus v. Everett, 20 Wend. 267.
Brown v. Peabody, 3 Kern. 121.

The purchaser of personal property, upon which there is a valid chattel mortgage, who consumes or sells a part of the property so that what remains does not produce sufficient

to satisfy the mortgage debt, may be held personally liable for the deficiency.

Beers v. Waterbury, 8 Bosw. 296.

IV. By the Mortgagee.

Where a mortgagor of chattels is in default, the mortgagee has a right to take the property into his possession and dispose of it at his pleasure. And if, after forfeiture, the mortgagee sells the property to a third person with the consent of the mortgagor, this will be equivalent to a formal foreclosure of the equity of redemption.

Talman v. Smith, 39 Barb. 390.

Upon default in the payment of a chattel mortgage, the title to the mortgaged property becomes absolute in the mortgagee, and thereafter the mortgagor has only an equity of redemption in such property.

Parshall v. Eggert, 54 N. Y. 18.
Judson v. Easton, 58 N. Y. 664.
Bragelman v. Daue, 69 N. Y. 69.
Noyes v. Wyckoff, 30 Hun, 466.
Duffus v. Bangs, 43 Hun, 52.
King v. Walbridge, 48 Hun, 470.

To bar such right of redemption, there must be a sale of the mortgaged property, of which the mortgagor has notice

A private sale, without notice, does not bar or foreclose the equity of redemption, notwithstanding the mortgage authorizes a private or public sale of the property.

Ballou v. Cunningham, 4 Lans. 74.

The cases of *Chamberlain* v. *Martin*, 43 Barb. 607, and *Huggins* v. *Fryer*, 1 Lans. 276, hold however, that under

such circumstances, where the mortgage contains what is known as the danger clause, that the mortgagee may take possession of such property before the debt falls due, and sell the same without making a demand for payment, and without giving personal notice of sale to the mortgagor, and that the right of redemption is cut off by such sale.

A mortgagee of chattels whose title has become absolute, is not bound to foreclose his mortgage; to extinguish the equity of redemption, he should do so.

Taylor v. Walter, 34 How. 385.
Elder v. Rouse, 15 Wend. 218.

And such equity of redemption can be extinguished only by an action to foreclose, either legal or equitable, or by a sale under the power contained in the mortgage. Such sale must be a fair and *bona fide* sale.

Stoddard v. Denison, 38 How. 301.
Porter v. Parmley, 52 N. Y. 187.
Cutler v. The James Goold Co., 43 Hun, 516.
King v. Van Vleck, 109 N. Y. 367.

The mortgagee may purchase the chattels at such sale.

Hall v. Ditson, 55 How. 19.
Olcott v. Tioga R. R. Co., 27 N. Y. 546.
Edminston v. Brucker, 40 Hun, 256. Citing
Hart v. Ten Eyck, 2 Johns. Ch. 62.
Charter v. Stevens, 3 Den. 33.
Patchin v. Pierce, 12 Wend. 61.
Hall v. Ditson, 55 How. 19.
King v. Walbridge, 48 Hun, 470.

Where a mortgagee takes possession of the mortgaged property, it will, if of sufficient value, be deemed a satisfaction of the debt until the equity is foreclosed.

Stoddard v. Denison, 38 How. 301.

Where the mortgagee sells under a chattel mortgage, property more than sufficient to pay the mortgage debt, bids the same in himself, and takes possession, claiming the property under this title, the mortgagor may elect to treat the entire sale as valid, and to regard the amount for which the property sold in excess of the indebtedness secured, as unpaid purchase money in the hands of the mortgagee.

Davenport v. McChesney, 86 N. Y. 242.

If the debt is payable in installments, and default be made in the payment of one installment only, the title of the mortgagee is as perfect as if default was made in the payment of the whole debt. To entitle the mortgagor to redeem, he must pay or tender the whole debt.

Halstead v. Swartz, 46 How. 289.
Willis v. O'Brien, 3 Jones & Spencer, 537.

The mortgagor, in such case, cannot recover the payments that he has made.

Haynes v. Hart, 42 Barb. 58. Citing
Green v. Green, 9 Cow. 46.
Battle v. The Rochester City Bank, 3 Comst. 88.

Where the mortgagee of the interest of one tenant in common of a chattel causes the whole chattel to be sold at public sale, by virtue of his mortgage, one who purchases and takes possession of the chattel at such sale, with notice of the rights of the other tenant in common, is liable to him in an action for the conversion for his interest therein.

Van Doren v. Balty, 11 Hun, 239.

Where a mortgage, given to secure the purchase-price, contains a clause that the property shall remain in the possession of the mortgagor until default, but on default, or in case the mortgagor shall attempt to remove or dispose of

the property, the mortgagee may take possession and sell it, upon the mortgagor's removing the property from the county, although the time for payment has not yet expired.

Russell v. Butterfield, 21 Wend. 300.

An action in equity lies to foreclose a chattel mortgage.

Briggs v. Oliver, 68 N. Y. 336.

And such right of action has not been taken away by the Code of Civil Procedure.

Fiero's Special Actions, 409.
Code of Civil Procedure, section 1741.

Where one condition of a mortgage was, that if the mortgagor should at any time, before the date of payment, suffer any attachment, or other process, to be issued against him, that then the whole amount should become instantly due and payable; *held*, that when such process was issued, the mortgage became due and payable at once, and the mortgagee could take the property from the sheriff.

Bryan v. Smith, 13 Daly, 332.

Where a mortgagee of chattels, upon a public sale, makes reasonable and fair efforts to sell the property for a good price, and through the acts, statements and notices of the mortgagor at the time of the sale, the effect of which is to discourage bidding, and the same does not bring a full price, a court of equity will not set aside the sale on the application of the mortgagor.

Hall v. Ditson, 55 How. 19.

It is unnecessary that a chattel mortgage should state that non-payment should work a forfeiture. This is an inci-

dent of the relationship between the parties, and a mortgagor must pay or else his rights at law are terminated.

Bragelman v. Daue, 69 N. Y. 69.

But where the mortgagee, after forfeiture, receives payment of his debt, it is a waiver of the forfeiture, and his title to the property is extinguished.

West v. Crary, 47 N. Y. 423.

A purchaser on sale under a chattel mortgage, is not concluded by a subsequent adjudication, in an action against the mortgagor and mortgagee, to which he was not made a party, that the mortgage was fraudulently made.

Where the purchase was in good faith, the title of the purchaser is not affected by the fact that the mortgage was executed in pursuance of a conspiracy between the mortgagor and mortgagee, to hinder, delay and defraud the creditors of the former.

Zoeller v. Riley, 100 N. Y. 102.

An injunction lies, at the suit of a mortgagor of chattels, with the reservation of possession for a certain time, to prevent the mortgagee from taking possession before the time limited.

Ford v. Ransom, 8 Abb. (N. S.) 416.

If, after sale, there remains a surplus, such surplus belongs to the mortgagor.

Parish v. Wheeler, 22 N. Y. 494.

If there be a deficiency, the mortgagee may maintain an action for such deficiency.

Case v. Boughton, 11 Wend. 106.

The remedy by sale, under the power in the mortgage, without resort to judicial proceedings, is in most cases a more speedy and effectual means of extinguishing the equity of redemption, and has to a great extent superseded a resort to an action of foreclosure; but the right to foreclose by action has not been taken away.

Briggs v. Oliver, 68 N. Y. 336.

There is no definite course of practice laid down in the cases, or by statute, and in the absence of any other guide, it would be safe to adopt the method of sale and of giving notice prescribed by statute for sales of goods and chattels upon execution. This would involve the fastening up of written or printed notices of the sale, in three public places of the town where such sale is to be had, specifying the time and place where the same is intended to be had, at least six days previous to such time. One of these notices should also be delivered to the mortgagor personally, or left at his place of residence. An advertisement of the notice in a newspaper may or may not be made, according to the special circumstances of each case; and it should be made, if, in the judgment of the mortgagee, the probability of a larger attendance and of better prices would render the incurring of the expense prudent or desirable for the interests of all concerned. In general, it may be remarked that in small towns, the posting of the notices will afford sufficient publicity, while in large cities, chattels of any considerable value, should not be sold without advertising the notice of sale in one of the public prints.

Thomas on Mortgages, 453.

One whose property is about to be sold by virtue of a chattel mortgage, may lawfully agree with another, that the latter shall bid a certain amount for the property, and if he becomes the purchaser, shall give the mortgagor an undivided interest therein for the benefit of the members of his family, on his paying an equal share of the purchase-money.

Such an agreement is neither a fraud upon creditors, nor against public policy.

Banne v. Drew, 4 Den. 287.

Upon a sale of property by virtue of a chattel mortgage, the proceeding is notice to the public, that the mortgagee is selling, not his own title to the property, but that which he has acquired through the mortgage, and no warranty of title of the property so sold, is to be implied against the mortgagee.

Sheppard v. Earles, 13 Hun, 651.

Article second, of title 2, of chapter 14 of the Code of Civil Procedure, provides a simple, cheap and speedy method of foreclosing a chattel mortgage. It is much more simple than an equitable action, but the right to bring an action in equity is fully preserved in said article. The provisions of the article are as follows:

"§ 1737. An action may be maintained to foreclose a lien upon a chattel, for a sum of money in any case where such a lien exists at the commencement of the action. The action may be brought in any court of record, or not of record, which would have jurisdiction to render a judgment in an action founded upon a contract for a sum equal to the amount of the lien."

"§ 1738. Where the action is brought in the Supreme Court, a Superior City Court, the Marine Court of the city of New York, or a County Court, if the plaintiff is not in possession of the chattel, a warrant may be granted by the court, or a judge thereof, commanding the sheriff to seize the chattel, and safely keep it to abide the final judgment in the action. The provisions, of title third of chapter seventh, of this act apply to such a warrant, and to the proceedings to procure it and after it has been issued, as if it was a warrant of attachment, except as otherwise expressly prescribed in this article."

"§ 1739. In an action brought in a court specified in the last section, final judgment, in favor of the plaintiff must specify the amount of the lien, and direct a sale of the chattels to satisfy the same and the costs, if any, by a referee appointed thereby, or an officer designated therein, in like manner as where a sheriff sells personal property by virtue of an execution; and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the amount of the lien, and the costs of the action."

"It must also provide for the payment of the surplus to the owner of the chattel, and for the safe-keeping of the surplus, if necessary, until it is claimed by him. If a defendant, upon whom the summons is personally served, is liable for the amount of the lien, or for any part thereof, it may also award payment accordingly."

"§ 1740. Where the action is brought in a court, other than one of those specified in the last section but one, if the plaintiff is not in possession of the chattel, a warrant, commanding the proper officer to seize the chattel, and, safely keep it to abide the judgment, may be issued, in like manner as a warrant of attachment may be issued in an action founded upon a contract, brought in the same court; and the provisions of law, applicable to a warrant of attachment, issued out of that court, apply to a warrant, issued as prescribed in this section, and to the proceedings to procure it, and after it has been issued; except as otherwise specified in the judgment."

"A judgment in favor of the plaintiff, in such an action, must correspond to a judgment, rendered as prescribed in the last section, except that it must direct the sale of the chattel by an officer to whom an execution, issued out of the court, may be directed; and the payment of the surplus, if its safe-keeping is necessary, to the county treasurer, for the benefit of the owner."

"§ 1741. This article does not affect any existing right or remedy to foreclose or satisfy a lien upon a chattel, without

action; and it does not apply to a case, where another mode of enforcing a lien upon a chattel is specially prescribed by law."

It is immaterial, since the enactment of the Code of Civil Procedure, whether the plaintiff names his action as equitable or legal. The court will grant him such relief as the allegations in the complaint and the proofs on the trial demand.

King v. Van Vleck, 109 N. Y. 363.

Of Taking Possession under the Danger Clause.

The danger clause is for the benefit of the mortgagee, and authorizes possession when there was default, or when in their judgment they deemed it best for the safety of their demand; and no proof is required to show that they so consider themselves unsafe, as the legal presumption would be that such was the fact, when possession was taken before it was due.

Smith v. Post, 1 Hun, 518.

In the case of *Allen* v. *Vose*, 34 Hun, 57, a chattel mortgage was given upon a growing crop of wheat and a mare, which provided, "that in case the said mortgagee shall at any time deem himself unsafe, it shall be lawful for him to take possession of the said property, and to sell the same at public or private sale, previous to the time above mentioned, for the payment of said debt, applying the proceeds upon the mortgage after deducting all expenses of sale and keeping said property." On July 17, the crop having proved to be a failure, the mortgagor sold his interest therein to the defendant for $10, which was applied on the debt. The mortgage was given for $100. The mare was worth not more than $50. On July 18, the mortgagee took possession of, and sold the mare, under the above-mentioned clause. *Held*, that he had reasonable cause to deem himself unsafe, and was justified in acting as he did.

The right of the mortgagee to take possession of the mortgaged property under such a clause, considered by Haight, J., and the cases bearing thereon collated.

CHAPTER V.

I. Assignment.
II. Payment.
III. Satisfaction.
IV. Redemption.

ASSIGNMENT.

A chattel mortgage may be assigned, and if such assignment include the debt secured thereby, it passes all the mortgagee's interest in the mortgaged property. The debt is the principal thing, and the mortgage an incident only.

An assignment of the debt carries the mortgage, and an assignment of the mortgage without the debt, is a nullity.

Langdon v. Buel, 9 Wend. 80.
Johnson v. Hart, 3 Johns. Cas. 322.
Gould v. Marsh, 1 Hun, 566.
Freeman v. Auld, 44 N. Y. 57.
Bloomingdale v. Bowman, 21 N. Y. St. Rep. 247.

After default, the mortgagee is the legal owner, and can make a valid transfer of the property itself. If, therefore, the mortgagee should assign the mortgage, retaining the debt, his assignee would still acquire his rights in the mortgaged property.

Campbell v. Birch, 60 N. Y. 215.

The assignment of any particular claim, is considered an equitable assignment of all securities held by the assignor to assure it. Thus the assignment of a debt by whatever form of transfer, carries with it any bill or note by which it is secured, and the converse of the proposition is equally true, that the transfer by endorsement or assignment of a bill or note, carries with it all securities for its payment, whether a mortgage or otherwise.

Daniel on Negotiable Instruments, 601.

A transfer of a chattel mortgage, merely by way of collateral security for the payment of a debt, is a pledge thereof, and need not be recorded; and notwithstanding such pledge, the pledgor may afterward assign the mortgage to a third person, who may enforce it by a sale of the goods, subject, however, to the lien of the pledgee.

Hawkins v. Kelly, 1 Robt. 160; s. c., 1 Abb. (N. S.) 32.

The provisions of the statutes relative to the filing of chattel mortgages, do not apply to assignments of them.

The latter are not required to be filed, as against an execution creditor of the mortgagee. Although a mortgagor, after the mortgage had been assigned by the mortgagee to a third person, as security for a debt due from the mortgagee to such third person, conveys without the knowledge or consent of such third party, by bill of sale, the mortgaged property to the mortgagee, which bill of sale is put on record, and the assignment is not recorded, yet, the mortgage in point of law is not cancelled by giving the bill of sale, as against the assignee of the mortgage. The only title the mortgagee acquires in such case, is the equity of redemption.

Baxter v. Gilbert, 12 Abb. Pr. Rep. 97.

A *bona fide* purchaser, before maturity, of a promissory note, secured by a chattel mortgage, takes the mortgage as

he takes the note, free from any equities which existed in favor of third parties, while it was held by the mortgagee.

Gould v. Marsh, 1 Hun, 566. Citing
Carpenter v. Longan, 16 Wall, 271.

But it is otherwise, where the mortgage is not given to secure a negotiable instrument, and generally an assignee will take the mortgage, subject to all the equities existing at the time of the assignment, in favor of the debtor against the assignor. The assignee takes the exact position of his vendor.

Hartley v. Tatham, 1 Keyes, 222.
Bush v. Lathrop, 22 N. Y. 535.
Schafer v. Reilly, 50 N. Y. 61.
Gould v. Marsh, *supra*.

If the mortgagee had notice of a prior unrecorded mortgage, the assignee takes his place, and is chargeable with the notice which the mortgagee had.

Decker v. Boice, 83 N. Y. 215.

II. Payment.

In general, the payment of the debt for the security of which a chattel mortgage is given, revests the title in the mortgagor, and operates as a discharge of the mortgage.

Thompson v. Van Vechten, 27 N. Y. 568.

Where a mortgagee of personal property, after forfeiture, receives payment of his debt, it is a waiver of the forfeiture, and the mortgagee's title is extinguished.

West v. Crary, 47 N. Y. 423.
Porter v. Parmley, 52 N. Y. 188.

The buyer of a chattel which was mortgaged, paid to the mortgagee part of the purchase-money, with the understanding that he should relinquish his claim under the mortgage, and although the mortgagee gave no formal discharge, it was held that the mortgagee could not afterward enforce his claim against the chattel.

Rickerson v. Raeder, 4 Abb. Ct. of App. Dec. 60.

Where a chattel mortgage is given to secure the surety and endorser of the mortgagor's note, and such note, after being protested, is paid out of the proceeds of a new note made by the mortgagor and endorsed by the mortgagee for that express purpose, the mortgage is not discharged by the payment of the original note, but continues in force as a security to the mortgagee for the amount of the second note.

In such case, it is proper to show that the payment of the original note with the proceeds of the second, was not designed to extinguish the mortgage.

Gregory v. Thomas, 20 Wend. 17.
Chapman v. Jenkins, 31 Barb. 164.
Butler v. Miller, 1 N. Y. 500.
Hill v. Beebe, 13 N. Y. 556.

But if a chattel mortgage be given to secure a debt, which by its terms extends the time of payment, a surety is by such act discharged.

Kane v. Cortesy, 100 N. Y. 132.

A mortgagee is not bound to foreclose his mortgage. He may take and retain the mortgaged property, and the mortgagee's taking and retaining possession in such case, constitutes payment of the mortgage debt.

Case v. Boughton, 11 Wend. 106.

So a conversion of the mortgaged property by the mortgagee to his own use, is a payment of the debt *pro tanto*.

Clark v. Griffith, 2 Bosw. 558.

If a purchaser at an execution sale, pay off a chattel mortgage thereon, it is extinguished, and he cannot enforce it against any other property than that which he purchases, although other property is embraced in the mortgage.

Brown v. Rich, 40 Barb. 28.

III. Satisfaction.

Chapter 171 of the Laws of 1879 provides as follows:

"§ 1. Whenever any mortgagor, or any person obtaining title to mortgaged property, shall present to any recorder, county or town clerk, in whose office a chattel mortgage executed by said mortgagor on such property may be filed, a certificate from the mortgagee therein named, or the holder or owner thereof, that such mortgage is paid or satisfied, it shall be the duty of such recorder, or either of the clerks above mentioned, to file such certificate in his office, and discharge such mortgage by writing in the book kept by such recorder or either of such clerks, and opposite the entry therein of such mortgage, the word 'discharged,' with the date thereof."

This certificate, it is believed, need not be acknowledged, in order to be filed.

Maxwell v. Inman, 42 Hun, 267.

Where the mortgagee takes possession of the mortgaged property, it will, if of sufficient value, be deemed a satisfaction of the debt, until the equity is foreclosed.

Stoddard v. Denison, 38 How. 296.

Where, upon a mortgage becoming due, the mortgagor, under an agreement with the mortgagee, delivered the mortgaged property to the mortgagee, who thereupon gave to the mortgagor, under such an agreement, a "satisfaction-piece" of the mortgage, which was filed; *held*, that an action to cancel such satisfaction so as to restore the mortgage to its priority over mortgages that had been subsequently given, but before the satisfaction * * * was proper, and could be maintained.

Lambert v. Leland, 2 Sweeny, 218.

III. Redemption.

Until foreclosure and sale, either by action or under the power contained in the mortgage, the mortgagor has an equity of redemption.

Noyes v. Wyckoff, 30 Hun, 466.
Duffus v. Bangs, 43 Hun, 52.
King v. Walbridge, 48 Hun, 470.
Cutler v. The James Goold Co., 43 Hun, 516.
King v. Van Vleck, 109 N. Y. 367.

A mortgagor cannot debar himself of his right to redeem, by a written agreement made at the time of the execution of the mortgage, to give up all claim to the property upon default.

Simon v. Schmidt, 41 Hun, 318.
Buneclaugh v. Poolman, 3 Daly, 236.

The action to redeem need not be brought in equity. An action for money had and received is proper.

King v. Van Vleck, *supra*.

In an action for redemption of personal property, the plaintiff may recover the rents and profits, or what is the

same thing, for the use of it, during the time he is deprived of such use.

Pratt v. Stiles, 17 How. 211.
Mickles v. Dillaye, 17 N. Y. 84.
Cutler v. The James Goold Co., *supra.*

In that case, defendant sold a carriage to the plaintiff, taking in part payment, several notes payable monthly, and a chattel mortgage upon the carriage to secure their payment, which provided that defendants might take the property and sell the same at such time as they should see fit.

At a time when there was no default in the payment of any of the notes, defendants attempted to seize the carriage, when plaintiff tendered the amount due upon all the remaining notes, attaching as a condition that such notes should be returned to him. *Held*, that the plaintiff had a right to redeem, and that the fact that his notes were negotiable and not due, justified requiring their return as a condition of the tender, and that he could maintain an action for the redemption of the property, in which the court might award a judgment for its value, upon proof that it had subsequently been sold.

It may be stated generally, that a mortgagor must redeem within a reasonable time. What constitutes such reasonable time must be determined by a court of equity, or statute of limitations specially applicable to the case.

Pratt v. Stiles, 17 How. Pr. 211.

An attaching creditor may redeem as soon as his attachment or execution becomes a lien, and an execution creditor has the same right as soon as he has acquired a lien by levy of his execution.

Hinman v. Judson, 13 Barb. 629.

One to whom the mortgaged property is bequeathed by will can redeem.

King v. Van Vleck, 109 N. Y. 367.

The mortgagor, or those standing in his place, has the right to redeem.

Hinman v. Judson, *supra*.

CHAPTER VI.

OF MORTGAGES ON SHIPS AND VESSELS.

I. Filing and recording.
II. Of liens for repairs and supplies.
III. Of validity.
IV. Of priority between liens and mortgages.
V. Of bottomry and respondentia.

I. Filing and Recording.

The United States statute (Act of July 29, 1850) provides as follows:

"SECTION 1. No bill of sale, mortgage, hypothecation, or conveyance of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, is recorded in the office of the collector of customs where such vessel is registered or enrolled. The lien by bottomry on any vessel created during her voyage by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section.

"The collectors of the customs shall record all such bills of sale, mortgages, hypothecations or conveyances, and also all certificates for discharging and cancelling any such conveyances in books to be kept for that purpose in the order of their reception, noting in such books and also on the bill of sale, mortgage, hypothecation or conveyance, the time when the same was received, and shall certify on the bill of sale, mortgage or hypothecation, or conveyance or certificate of discharge or cancellation, the number of the book and page where recorded; but no bill of sale, mortgage, hypothecation, conveyance or discharge of mortgage or other incumbrance of any vessel, shall be recorded, unless the same is duly acknowledged before a notary public or other officer authorized to take acknowledgment of deeds. The collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the purchaser or mortgagee, and shall permit such index and books of records to be inspected during office hours, under such reasonable regulations as they may establish; and shall, when required, furnish to any person a certificate, setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, if inserted in the register or enrollment, and also the material facts of any existing bill of sale, mortgage, hypothecation or other incumbrance upon such vessel, recorded since the issuing of the last register or enrollment, namely, the date, amount of such incumbrance, and from and to whom or in whose favor made."

U. S. Revised Statutes, §§ 4192–4194.

Vessels of the United States, within the meaning of the above statute, are such as have been built in the United States and belong wholly to citizens of the United States, and have been registered as required by statute, or if coasting vessels, such as have been enrolled and licensed as such.

Act of Congress, February 18, 1793, § 1.

In the case of a coasting vessel, she must be both enrolled and licensed, to make her a vessel of the United States.

Best v. Staple, 61 N. Y. 71.

A canal boat, or scow, is not a vessel of the United States, within the meaning of the act relating to the recording of mortgages.

Hicks v. Williams, 17 Barb. 523.

It has been held in Massachusetts (5 Allen, 280) that a pleasure yacht is not within the recording act.

A mortgage of a registered vessel need not be recorded in pursuance of any State statute, in order to give the mortgage a preference over a subsequent purchaser or mortgagee, if it be duly recorded according to the statute of the United States, in the office of the collector of the home port of the vessel.

The statute of the United States excludes all State legislation upon the subject, whether such legislation be prior or subsequent to the United States statute.

White's Bank v. Smith, 7 Wall. 646.
Aldrich v. Ætna Co., 8 Wall. 491. Reversing s. c., 26 N. Y. 92, and overruling in part
Thompson v. Van Vechten, 27 N. Y. 568.
Folger v. Weber, 16 Hun, 512.
Best v. Staple, 61 N. Y. 71.

" Previous to the act of 1850, providing for the recording of bills of sale, and mortgages of vessels, they were required to be filed by the law of many of the States, in the clerk's office or some place of public deposit in the town or city where the vendor or mortgagor resided, in order to protect the interest of the vendee, or mortgagee, against subsequent *bona fide* purchasers or mortgagees, and this

practice continued in many places after the passage of the act of 1850 for abundant caution, on account of a doubt as to the effect that would, or might be given to it, as a recording act from the very imperfect provisions of the law. There can be no doubt, however, but that the system of recording these instruments in the collector's office at the home port of the vessel form a much readier opportunity to persons dealing in this species of property to obtain a knowledge of the condition of the title, than by the former mode under the State law."

Nelson, J., in White's Bank v. Smith, 7 Wall. 646.

The New York State statute, chapter 412 of the Laws of 1864, provides:

"SECTION 1. Hereafter, any person having any lien or incumbrance on any canal boat, steam tug, scow or other craft, navigating the canals of this State, by a chattel mortgage, shall file the same, or a true copy thereof, in the office of the auditor of the canal department.

"§ 2. Hereafter, every mortgage or conveyance intended to operate as a mortgage of any canal boat, steam tug, scow or other craft navigating the canals of this State, together with the appurtenances belonging thereto, and used in navigating such craft hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed as directed in the previous section of this act.

"§ 3. Every mortgage filed in pursuance of this act shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding

the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed as directed in the first section of this act."

A chattel mortgage on a canal boat not accompanied by an immediate delivery, and followed by an actual and continued change of possession, is absolutely void against creditors of the mortgagor, unless it be filed as provided by chapter 412, Laws of 1864, notwithstanding the fact that the mortgagor, mortgagee and attaching creditor are all non residents of the State.

Keller v. Paine, 107 N. Y. 83.

The office of auditor of the canal department was abolished by the statute of 1883, and the duties performed by such auditor were, by said act, to be thereafter performed by the comptroller.

Laws of 1883, chapter 69.
See The Ella B., *post*.

Under the New York statutes, if the vessel be engaged in canal navigation, the specifications of the debt must be filed in the office of the canal department.

The Ella B., 26 Fed. Rep. 111 (District Ct., N. Y., 1886).

Under the act of 1862 (chapter 482), the specifications as therein provided, must be filed in the office of the clerk of the county in which such debt shall have been contracted, except that when such debt shall have been contracted in either of the counties of New York, Kings or Queens, such specifications shall be filed in the office of the clerk of the city and county of New York.

II. Of Liens for Repairs and Supplies.

Chapter 482 of the Laws of 1862 of this State provides as follows:

"Section 1. Whenever a debt amounting to $50 or upwards as to a sea going or ocean bound vessel, or amounting to $15 as to any other vessel, shall be contracted by the master, owner, charterer, builder or consignee of any ship or vessel, or the agent of either of them within this State, for either of the following purposes:

"*First.* On account of work done or materials furnished in this State for, or towards the building, repairing, fitting, furnishing or equipping such ship or vessel.

"*Second.* For such provisions and stores furnished within this State as may be fit and proper for the use of such vessel at the time when the same were furnished.

"*Third.* On account of the wharfage and expenses of keeping such vessel in port, including the expense incurred in employing persons to watch her.

"*Fourth.* On account of loading or unloading, or for advances made for the purpose of procuring necessaries for such ship or vessel, or for the insurance thereof.

"*Fifth.* Or whenever a debt, amounting to $25 or upwards, shall be contracted, as aforesaid, within this State, on account of the towing or piloting such vessel, or on account of the insurance or premiums of insurance, of or on such vessel, or her freight, such debt shall be a lien upon such vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon except mariners' wages.

"§ 2. Such debt shall cease to be a lien at the expiration of six months after the said debt was contracted, unless at the time when said six months shall expire, such ship or vessel shall be absent from the port at which such debt was contracted, in which case the said lien shall continue until

the expiration of ten days after such ship or vessel shall next return to said port; and, in all cases, such debt shall cease to be a lien upon such ship or vessel, whenever such ship or vessel shall leave the port at which such debt was contracted, unless the person having such lien shall, within twelve days after such departure, cause to be drawn up and filed, specifications of such lien, which may consist either of a bill of particulars of the demand, or a copy of any written contract under which the work may be done, with a statement of the amount claimed to be due from such vessel, the correctness of which shall be sworn to by such person, his legal representatives, agents or assigns.

"§ 3. Such specifications shall be filed in the office of the clerk of the county in which such debt shall have been contracted, except that when such debt shall have been contracted in either of the counties of New York, Kings or Queens, such specifications shall be filed in the office of the clerk of the city and county of New York."

The remaining provisions of said act, apply to the foreclosure of the lien, and the distribution of the proceeds.

Section 2 of the foregoing act was amended by chapter 273 of the Laws of 1885 as follows:

"§ 2. Such debt shall cease to be a lien at the expiration of twelve months after the said debt was contracted, unless at the time when said twelve months shall expire, such ship or vessel shall be absent from the port at which said debt was contracted, in which case the said lien shall continue until the expiration of thirty days after such ship or vessel shall next return to said port; and in all cases such debt shall cease to be a lien upon such ship or vessel, whenever such ship or vessel shall leave the port at which such debt was contracted, unless the person having such lien shall, within twelve days after such departure, cause to be drawn up and filed, specifications of such lien, which may consist either of a bill of particulars of the demand, or a copy of any written contract, under which the work may be done, with a

statement of the amount claimed to be due from such vessel, the correctness of which shall be sworn to by such person, his legal representatives, agents or assigns."

Section 2 of the act of 1862 was further amended by chapter 88 of the Laws of 1886 as follows:

"Such debt shall cease to be a lien at the expiration of twelve months, after the said debt was contracted, unless at the time when said twelve months shall expire, such ship or vessel shall be absent from the port at which said debt was contracted, in which case the said lien shall continue until the expiration of thirty days after such ship or vessel, shall next return to said port, and in all cases, such debt shall cease to be a lien upon such ship or vessel, unless the person having such lien shall, within thirty days after said debt is contracted, cause to be drawn up and filed, specifications of such lien, which may consist either of a bill of particulars of the demand, or a copy of any written contract, under which the work may be done, with a statement of the amount claimed to be due from such vessel, the correctness of which, shall be sworn to by such person, his legal representatives, agent, or assigns."

The seventh section of the act of 1862, was amended by chapter 422 of the Laws of 1863, as follows:

"SECTION 1. Section seventh of chapter 482 of the Laws of 1862, is hereby amended by striking out of said section the word 'eleventh' and inserting in place thereof, the word 'twelfth.'

"§ 2. The second section of the said chapter shall not apply to vessels navigating the western and northwestern lakes, or either, or any of them.

"Any debt contracted by the master, owner, charterer, builder or consignee of any ship or vessel navigating such lakes, or either of them, or by the agent of such master, owner, charterer, builder or consignee, shall cease to be a lien at the expiration of six months after the first of January

next succeeding the time such debt shall have been contracted, unless during the six months such ship or vessel shall be absent from the port at which such debt was contracted, in which case the said lien shall continue until the expiration of ten days after such ship or vessel shall next return to said port. In all cases such debt shall cease to be a lien upon such ship or vessel unless the person having such debt, shall by the first Tuesday of February next succeeding the time such debt shall have been contracted, cause to be drawn up, verified and filed, specifications of such debt, in the form and comprising the statements prescribed by said chapter."

Sections 3 and 9 of the act of 1862, were amended by chapter 334 of the Laws of 1879, as follows:

"Such specifications shall be filed in the office of the clerk of the county in which such debt shall have been contracted, except that when such debt shall have been contracted in either of the counties of New York, Kings or Queens then such specifications shall be filed in the office of the clerk of the city and county of New York; and it shall also be the duty of any and all parties or persons, their heirs, their legal representatives, agents or assigns, after the filing of such specifications in the county clerk's office as in said act provided, in case the vessel is built, used or fitted for the navigation of any of the canals or lakes of this State, to immediately thereafter file, or cause to be filed, a copy of said specifications in the office of the auditor of the canal department, duly certified by the county clerk, in whose office the original specifications shall have been filed.

"§ 9. The person applying for such warrant shall, within three days after the issuing thereof, cause a notice to be published once in each week, for four successive weeks, in some newspaper published in the county in which such vessel may then be, or if no newspaper be so published in such county, then in the nearest county in which a newspaper shall be so published, setting forth that such warrant has

been issued, the amount of the claim specified therein, the day when such warrant was issued, and that such vessel will be sold for the payment of the claims against her, unless the master, owner or consignee thereof, or some person interested therein, appear and discharge such warrant according to law, within thirty days from the first publication of such notice, and in case the vessel is built, used or fitted for the navigation of any of the canals or lakes of this State, shall also serve a copy of such notice, personally, at least ten days before the issuing of the order of sale mentioned in section fifteen of the act hereby amended, upon all persons who may have filed any claim or lien upon such ship or vessel. by mortgage or otherwise, in the office of the auditor of the canal department, or the service of such notice may be made at least twenty days before the issuing of said order above mentioned, by leaving a copy of the same at their dwelling-house in charge of some person of suitable age, or by depositing the same in the post-office properly folded and directed to such persons at their respective places of residence, and paying the postage thereon."

This act was further amended by chapter 216 of the Laws of 1885, which provides as follows:

"SECTION 1. Section 2 of chapter 422 of the Laws of 1863 * * * is hereby amended as follows:

"§ 2. The second section of said chapter shall not apply to vessels navigating the western and north-western lakes, or either or any of them, or the St. Lawrence river.

"Any debts contracted by the master, owner, charterer, builder or consignee of any ship or vessel navigating such lakes, or either of them, or navigating said river or by the agents of such master, owner, charterer, builder or consignee, shall cease to be a lien at the expiration of six months after the first day of January next succeeding the time such debt shall have been contracted, unless during the said six months such ship or vessel shall be absent from the port at which such debt was contracted, in which case the

said lien shall continue until the expiration of ten days after such ship or vessel shall next return to said port. In all cases such debt shall cease to be a lien upon said ship or vessel unless the person having such debt, shall by the first Tuesday of February next succeeding the time such debt shall have been contracted, cause to be drawn up, verified and filed, specifications of such debt in the form and comprising the statements prescribed by said chapter."

In New York no lien is given for *services*, which are in no sense maritime, rendered after the close of navigation.

A mariner may also be a mechanic; but the fact that he works as such upon a vessel, while she is lying in port, does not give him a lien for his services.

The Alonson Sumner, 28 Fed. Rep. 670. (Dist. Ct. N. Y. 1886.)

The New York statute of 1862, chapter 482, so far as it attempts to give a remedy for the enforcement of maritime contracts, which is not according to the course of the common law, is unconstitutional and void. A contract for repairs done, or for supplies furnished to a vessel, either foreign or domestic, is a maritime contract, which courts of admiralty have jurisdiction; but where such work is done, or supplies furnished to a domestic vessel in her home port, no lien exists in the maritime law.

The Edith, 94 U. S. 520.

Under the maritime law, there is no lien upon a vessel for materials furnished and work done in repairing her at her home port.

The Edith, *supra*.
The Lattawanna, 21 Wall. 558.

The authorities are very clear that an agreement for the building and construction of a vessel is not maritime.

People's Ferry Co. v. Beers, 20 How. (U. S.) 402.
Roach v. Chapman, 22 How. 129.
Morewood v. Enequist, 23 How. 491.
Edwards v. Elliott, 21 Wall. 532.
Cunningham v. Hall, 1 Cliff. 46.
Young v. The Orphans, 2 Cliff. 29.

A sailing vessel, in process of construction, was launched before it was completed, and thereafter the plaintiff contracted to furnish her with sails, as part of, and to complete the work of construction. She was then drawn out of the water and again put upon the ways, and while there her construction was completed and the sails furnished. *Held*, that the contract was not a maritime one; and that a lien upon the vessel for the price of the sails, perfected in accordance with the provisions of the act of 1862 (chapter 482, of Laws of 1862) was valid and enforceable.

Wilson v. Lawrence, 82 N. Y. 409.

In the case of *Warner* v. *Miller*, 13 Hun, 654, the plaintiff's intestate made repairs upon a canal boat, owned by the defendant, in pursuance of orders received from the captain of the boat. Subsequently the captain paid to the plaintiff, a portion of the bill and gave his note for the balance. The plaintiff, without returning the note, brought this action to recover of the defendant, the amount of the unpaid balance due for the repairs. The court said:

"The defendant was owner of the boat, and as such, was liable for repairs made upon her by direction of the captain. When it is shown, however, that the repairs were made on the credit of the captain alone, the owner is not liable; and taking the note of the captain for the amount of the repairs is sufficient evidence of that fact. The note, in such case, is not considered as payment of the debt, so as thereby to discharge the owner, but solely as evidence that the work was not done on the credit of the owner. The plaintiff cannot recover."

A steam dredge being within the definition of a vessel in the United States Revised Statutes, is subject to a maritime lien for supplies.

Pioneer, 30 Fed. Rep. 206. (U. S. Dist. Ct. N. Y.)

The home port of a vessel is made by the statute, at or nearest to which the owner usually resides. (U. S. Revised Statutes, § 4141.) The fact that a person has a continuous business place at another place than where he resides, at which he is found during office hours, will not constitute such place his residence in the statutory sense.

The Thomas Fletcher, 24 Fed. Rep. 375.

The departure of a domestic vessel in the regular course of her occupation, from Brooklyn to Long Beach, and upon her return making fast to the shore in Rockaway Inlet, is such a leaving of the port as to prevent the enforcing of a lien against her under the laws of the State of New York.

The Whistler, 30 Fed. Rep. 199. (Dist. Ct., E. D. of N. Y.)

If supplies are furnished in the home port, the duration and requirements of the lien depend upon the terms of the State statute.

The Ella B., 26 Fed. Rep. 111.

Where, after default in the payment of the sum secured by a chattel mortgage upon a canal boat, the owner, with the knowledge and consent of the mortgagee, continues in possession, running the boat as his own, he is authorized to keep her in repair, and can confer a right of lien thereon for repairs necessary to make her fit for navigation.

A shipwright, therefore, to whom the boat has been delivered by the owner, while it remains in his possession, has

a lien thereon for necessary repairs, which lien is superior to that of the mortgage.

There is no distinction in this respect between a steamboat, or a vessel navigating the ocean, or navigable waters connected therewith, and a canal boat.

Scott v. Delahunt, 65 N. Y. 208.

In the case of *The Phoenix Iron Co.* v. *The Vessels*, 43 Hun, 429 (which was a proceeding instituted under chapter 482, of the Laws of 1862, providing for the collection of demands against ships and vessels), it was shown that between August, 1880, and October, 1884, the plaintiff sold and delivered, at Newburgh, N. Y., to the firm of Ward, Stanton & Co., shipbuilders at that place, iron work designed to be used by the said firm, in constructing two iron ferry boats for the Hoboken Land and Improvement Co. (a New Jersey corporation), under a contract entered into by the said firm, by which it agreed to build the vessels for a fixed sum. On November 15, 1884, the firm being unable to complete the vessels, conveyed them to the corporation in an extremely unfinished condition, and shortly thereafter made a general assignment for the benefit of creditors. On November 21, 1884, the firm inclosed by letter, notes payable at a future time, for the iron work purchased of the plaintiff, although no credit was provided for by the agreement for its sale. These notes were accepted by the plaintiff in ignorance of the condition of the firm and of the change in the title to the vessels.

Held, that such acceptance did not deprive the plaintiff of the lien upon the vessels to which they were entitled by the act of 1862.

That the materials furnished by the plaintiff were a basis for a lien, although they were not actually put into the vessel at the time the action to enforce the lien was commenced.

A canal boat is a vessel within the meaning of the act of 1862.

Crawford v. Collons, 45 Barb. 269.
King v. Greenway, 71 N. Y. 413.
Emmons v. Wheeler, 3 Hun, 545.
Nelson v. Yates, 37 Hun, 52.

There is no lien for services rendered under the act of 1862, in raising a sunken canal boat.

Nelson v. Yates, *supra*.

One engaged in repairing and putting new machinery into a steam canal boat, is a builder within the meaning of the act providing for the collection of demands against ships and vessels, and a lien is created under said act, in favor of one furnishing materials to such builder for the work. Said act, so far as it creates and provides for liens upon boats constructed for, and navigating the canal, or the interior waters of the State, is not violative of the Constitution of the United States, but is valid.

King v. Greenway, 71 N. Y. 413.

Admiralty jurisdiction does not extend to contracts relating to a vessel wholly engaged in the internal commerce of a State, and no maritime lien or claim can be founded on such contract; and the United States courts are wholly without jurisdiction in such cases.

Fralick v. Betts, 13 Hun, 632. Citing
Maguire v. Card, 21 How. (U. S.) 248.
Allen v. Newberry, 21 How. 244.
Brookman v. Hamill, 43 N. Y. 554.

When a domestic vessel is libelled for supplies furnished her, and is sold before the expiration of the thirty days

within which the State laws require specifications to be filed, and no specifications are filed at any time, *held*, that the proceeds in court should be distributed according to the liens upon her at the time the libels were filed.

The Niagara, 31 Fed. Rep. 163.

III. Of Validity.

In a suit in regard to the validity of a mortgage of a vessel, recorded in the office of a collector of customs, the mortgagee must show that the vessel was of such a character, or was owned in such a way, that she became a vessel of the United States; and if the vessel be employed in the coasting trade, he must show that she was both enrolled and licensed.

Best v. Staple, 61 N. Y. 71.

As between the parties, and as against persons having actual notice, a mortgage of a vessel is good without acknowledgment and record.

Parker Mills v. Jacot, 8 Bosw. 161.
Moore v. Simonds, 100 U. S. 145.

A bill of sale of a vessel, absolute in its terms, like such a bill of sale of any other chattels, may be shown by oral evidence to be only a mortgage.

Morgan v. Shinn, 15 Wall. 105.

Upon default in a mortgage of a ship, the legal title of the mortgagee becomes absolute, just as in the case of a mortgage of other personal property. To extinguish the equity of redemption, the mortgagor must resort either to a court of equity, or to statutory remedies for foreclosure.

Bogart v. The John Jay, 17 How. (U. S.) 399.

The only purpose of requiring a chattel mortgage of a vessel to be acknowledged, is to authenticate it for record.

Moore v. Simonds, 100 U. S. 147.

The mortgagor is not personally liable unless the mortgage contains a covenant on his part to pay the debt.

Jenkins v. Wheeler, 2 Abb. App. Dec. 445.

The act of 1862, providing for the collection of demands against vessels, so far as it gives a lien for supplies furnished to, or repairs made upon, a vessel engaged in foreign commerce is unconstitutional, as it infringes upon the exclusive jurisdiction of the Federal courts.

Brookman v. Hamill, 43 N. Y. 554.
In re The Steamboat Josephine, 39 N. Y. 19.
Poole v. Kermit, 59 N. Y. 554.

"No mortgage of any vessel, or of any other goods or chattels, made as security for any debt, in good faith, and for a present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States, or of any State, shall be invalidated or affected by an assignment in bankruptcy."

U. S. Revised Statutes, § 5052.

IV. Of Priority between Liens and Mortgages.

Liens for advances made in a foreign port to pay for necessary repairs and supplies, have priority over existing mortgages to creditors at home; such advances being for the security and protection of the vessel, they are for the benefit of the mortgagees, as well as of the owners.

The Emily Souder, 17 Wall. 666.

A mortgage, although duly recorded, is inferior to any strictly maritime lien; it is also inferior to a valid bottomry bond.

Baldwin v. The Bradish Johnson, 3 Woods, 582.
The De Smet, 10 Fed. Rep. 483.

The lien given by chapter 482, of the New York Laws of 1862, is enforceable in admiralty, and must prevail over the title of a purchaser of the vessel who has bought her without notice of the lien.

The Unadilla, 8 Ben. 478.

A lien for necessary repairs upon a canal boat is superior to the lien of a prior mortgage.

Scott v. Delahunt, 65 N. Y. 128.

The statute of 1862 provides that a debt for work done, or materials furnished, or for provisions and stores furnished to a ship, shall be a lien upon such vessel, and shall be preferred to all other liens thereon except mariners' wages.

This provision of said act is valid.

In re Josephine, 39 N. Y. 21.
Nelson v. Yates, 37 Hun, 56.

V. Of Bottomry and Respondentia.

"A bottomry bond is a bond given for a loan of money, upon the security of a vessel and its accruing freight; its payment being dependent upon maritime risks, to be borne by the lender. The condition of the bond is the safety of the hypothecated vessel. The loan is on condition, that if the vessel hypothecated be lost by the perils of the sea, the lender shall not be repaid. It is for a specified voyage more ordinarily, but sometimes for a specified time; and as it

substitutes the risk of the adventure to the unconditional responsibility of a borrower, the rate of interest is universally (though not of necessity) such as would, without that risk, be usurious. The lender becomes to that amount an insurer."

Verplank, J., in White v. Cole, 25 Wend. 514.

"Bottomry is a contract by which the owner of a ship hypothecates or binds the ship as security for the repayment of money advanced for the use of the ship. It is defined by Marshall, to be a contract in the nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and he pledges the keel or bottom of the ship, *pars pro toto*, as a security for the repayment; and it is stipulated, if the ship should be lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal and also the interest agreed upon, generally called *marine interest*."

2 Marshall Insurance, 733.

"An essential character of bottomry is, that the money lent is at the risk of the lender, during the voyage, and that the repayment thereof depends on the event of the successful termination of the voyage. It is the very essence of the contract, that the lender runs the risk of the voyage, and that both principal and interest be at hazard. If the vessel is lost, at the time the money becomes payable, the lender cannot recover either principal or interest, and where her arrival in safety entitles him to repayment, he is confined to the security of the ship, and cannot enforce his claim, personally, against the owner beyond the value of the pledged fund which may come into his hands. It is no bottomry, where the money is payable at all events; for the principal and extraordinary interest reserved is not put absolutely at hazard by the perils of the voyage. The lender

must run the maritime risk, to earn the maritime interest. If, by the terms of the contract, the owner binds himself, personally, to repay the loan, or there be collateral security for its absolute repayment, it is not a bottomry loan. Repayment does not depend upon the contingency of the safe arrival of the ship, but whether lost or not, it is to be made, and there is no risk taken."

Wright, J., in Braynard v. Hoppock, 32 N. Y. 572.

A bottomry bond is valid, although it includes the personal liability of the master. The master is personally liable on the bond, in such case, for the debt secured; but not unless the vessel arrives.

The master may bind the freight, as well as the vessel, in such a bond, by express stipulation; but in the absence of such a stipulation, the bond will create no lien upon the freight, directly. The master of a vessel has a lien on the cargo and freight, for advances made or liabilities incurred by him, in a foreign port, for the repairs and supplies of the vessel.

Kelly v. Cushing, 48 Barb. 269.

The fact that the bottomry bond not only pledges the ship, but, in terms, "grants, bargains, and sells" her, does not essentially vary its character or operation. It must still be considered a contract of bottomry.

Robertson v. United Ins. Co., 2 Johns. Cas. 250.

A bottomry bond is entitled to priority to liens for supplies and repairs, where, prior to its execution, the owner of the vessel was notified to assent to the bond, or to raise the necessary funds by other means.

The Thomas Fletcher, 24 Fed. Rep. 375.

Where an insurance company, which is authorized to loan upon bottomry, having already insured the vessel, and being unwilling to increase the risk, is applied to, for a loan upon bottomry, it may suspend an amount of the insurance, equal to the bottomry loan, and make such loan, without any violation of law.

North-western Ins. Co. v. Ferward, 36 N. Y. 139.

For discussion as to validity of bottomry bonds, see

3 Alb. Law Jour. 480.

RESPONDENTIA.

Respondentia is a loan of money, on maritime interest, on goods laden on board of a ship, upon the condition that if the goods be wholly lost in the course of the voyage, by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon.

The contract is called *respondentia*, because the money is lent mainly, or most frequently, on the personal responsibility of the borrower. It differs principally from bottomry, in the following circumstances: bottomry is a loan upon the ship; respondentia is a loan on the goods. The money is to be repaid to the lender, with maritime interest, upon the arrival of the ship in one case, and of the goods in the other. In most other respects the contracts are nearly the same, and are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable as well as the borrower; in the latter, the lender has, in general, it is said, only the personal security of the borrower.

If any part of the goods arrive safely at the end of the voyage, the lender is entitled to have the proceeds applied to the payment of his debt. If the loan is made by the

master, and not by the owners of the goods, the necessity for the loan and for the hypothecation of the cargo must be clearly shown, or the owners of the goods, and, consequently, the goods themselves, will not be bound. The ship and freight are always to be first resorted to, to raise money for the necessity of the ship, or the prosecution of the voyage; and it seems that a bond upon the cargo is considered, by implication of law, a bond upon the ship and freight also, and that unless the ship be liable in law, the cargo cannot be held liable.

Bouvier's Law Dict., page 471. Citing
The Constancia, 4 Notes of Cases, 285, 512, 518, 677.
10 Jur. 845.
2 W. Rob. Adm. 83–85.
14 Jur. 96.
See 3 Mas. C. C. 255.

Respondentia is the loan of money upon merchandise laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port.

The Brig Atlantic, 1 Newb. 516 (1885).

A bottomry or respondentia bond must be recorded at the office of the collector of customs.

U. S. Revised Statutes, §§ 4192, 4382.

Evidence.— The record of a bill of sale, mortgage, hypothecation, or conveyance of a vessel, belonging to a port or place within the United States, recorded in the office of the collector of customs, where the vessel is registered or enrolled, which was acknowledged or proved, before it was recorded, in like manner as a deed to be recorded within the State; or a transcript of such a record, duly certified by the collector; is evidence with the like effect as the original.

Code of Civil Procedure, § 945.

FORMS.

No. 1.

COMMON FORM OF A CHATTEL MORTGAGE.

To all to whom these presents shall come:

KNOW YE, That , of , county of , N. Y., indebted unto , of , in the sum of dollars, and cents, being for *.

NOW FOR SECURING THE PAYMENT of said debt, and the interest thereon from the date hereof, to the said , do hereby SELL, TRANSFER and ASSIGN to the said , the property described in the following SCHEDULE, viz.:

Said property now being and remaining in the possession of the said , at .**

PROVIDED ALWAYS, and this mortgage is on the express condition, that if the said , shall pay to the said , h assigns or representatives, the sum of dollars and cents, with interest thereon as follows, viz.:

Principal and interest payable at , which the said hereby agree to pay, then this transfer to be void and of no effect; *** but in case of non-payment of the said debt and interest at the time above mentioned, then the said shall have full power to enter upon the premises of the said part of the first part, or any other place or places where the goods and chattels aforesaid may be, to take possession of said property, to sell the same at public or private sale, and the avails (after deducting all expenses of the taking, and the sale, and keeping of said property) to apply in payment of the above debt; **** and in case the said shall at any time deem said property or debt unsafe, it shall be lawful for to take

possession of such property, and to sell the same at public or private sale, previous to the time above mentioned for the payment of said debt, applying the proceeds as aforesaid, after deducting all expenses for the taking, and the sale and keeping of the said property. And the said mortgagee, his representatives or assigns, may purchase at any such sale, in the same manner, and to the same effect as a person not interested herein.

If from any cause said property shall fail to satisfy said debt, interest, costs and charges, covenant and agree to pay the deficiency.

In Witness Whereof, have hereunto set hand and seal the day of , in the year of our Lord one thousand eight hundred and

Sealed and delivered in the presence of

.....(L.S.)

State of New York, }
County of , } *ss.:*
of }

On this day of in the year one thousand eight hundred and before me, the subscriber, personally appeared , to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same.

.....

.....

No 2.

Another Form, Containing Insurance Clause, etc.

(*As in Form* 1 *to the asterisk, continuing :*) collateral security for the payment of a certain note made by me, the said (*mortgagor*) , and bearing even date herewith, and due in days from the date hereof, and payable at ; and it is further agreed that this mortgage shall be as collateral security for the payment of any judgment into which said note may be merged, together with all cost and disbursements incurred in procuring said judgment. (*Continue as in Form* 1 *to* **, *then add:*)

And I further certify and state that I am the sole owner of the property mentioned in said schedule, and that the same is free and clear of all liens and encumbrances; this statement is made for the purpose of obtaining money on said note.

And it is further agreed that in case any attachment, levy or other legal process shall become a lien on said property before the maturity of this mortgage, that then and in that case, this mortgage shall immediately become due and payable.

And it is further agreed that in case the mortgagor herein shall remove said property from the place where it now is, without the written consent of the party of the second part, that this mortgage shall at once become due and payable, and the said mortgagee may take immediate possession of said property.

And it is further agreed that the said mortgagor will keep said property insured in a sum not less than $, and assign the policy to the said party of the second part, and in default thereof, the said party of the second part, may effect such insurance, and the cost of said policy may be added to the amount secured by these presents, and such sum so paid shall be a lien upon the said property.

(*Continue as in Form* 1 *to the end.*)

No. 3.

MORTGAGE OF A STOCK OF GOODS.

(*As in Form* 1 *to* ** , *continuing:*) It is agreed that said (*mortgagor*) , may sell and dispose of said property, and apply the proceeds of such sales to the payment of the debt hereby secured; and the said (*mortgagor*) , does hereby covenant and agree that as said stock is sold and disposed of by him, he will apply the proceeds to the payment of such debt; such sales may be made upon a credit not to exceed days, the said , taking good endorsed paper for said sales, which paper the mortgagee agrees to accept and apply upon said debt.

And it is further agreed that said , may use a part of the avails of such sales not to exceed $, to replenish and freshen the said stock, but it is agreed that in such case, the sub-

stituted stock shall take the place, and be in stead of, the stock so sold; and that this mortgage shall be renewed every days, and which renewal mortgage shall embrace and include such substituted stock.

It is the express understanding that no part of said stock, or of the proceeds of such sales, shall be used or disposed of by the said , except as hereinbefore set forth.

(*Continue as in Form* 1 *to the end.*)

No. 4.

CHATTEL MORTGAGE FARM LEASE.

(*As in ordinary lease, continuing:*) The said (*tenant*) , agrees that all the personal property on said land or hereafter brought on, shall be, and the same hereby is bound to said , for the faithful performance of all the covenants contained in this lease, and as collateral security for all the rent due and to become due for said land, and for any and all sums now or hereafter to be due, or owing from said , to said and said , also hereby agrees that all said personal property, and the crops raised and to be raised on said land, and the cows and all the increase thereof, shall be bound to, and hereby are bound to said , as collateral security for the faithful performance of all the covenants contained in this lease, and for the payment of said rent due, and to become due, and for any and all sums now due or hereafter to become due and owing from said , to said , for any cause whatever, and for this purpose said , shall have the title to all said personal property of whatever kind raised, made, produced, kept, put or used upon said farm, and he shall have the right of possession thereof at any time, and such title and right of possession is vested in said as collateral security for the faithful performance of all the covenants contained in this lease including the payment of rent due, and to become due, and any and all sums of money owing or to be hereafter due and owing from said , to said .

(*Continue as in ordinary lease.*)

No. 5.

Mortgage for Future Advances.

(*As in Form* 1 *to the asterisk, continuing :*) This grant is intended as a security for the payment of any debt, demand or liability now incurred or held by the said , or which may hereafter be incurred or held by the said (*mortgagee*) , on account of, or against the said (*mortgagor*) , and also a security against any liability of said (*mortgagee*) , by reason of, or on account of any endorsement or undertaking which has been, or may hereafter be made or incurred by said (*mortgagee*) , for said (*mortgagor*) , and this mortgage is to be a continuing security for the above, and all costs and expenses to the amount $.

(*Continue as in Form* 1, *between* *** *and* ****, *as follows :*) And it is further agreed that upon default being made by said , to pay any debt or obligation held by said (*mortgagee*) , or on which he might be liable, when presented for payment, or at maturity said , may take possession of the said property, and for that purpose shall have full power to enter upon the premises of the said party of the first part, or other place where the goods and chattels aforesaid may be, and may sell the same at public or private sale at such time and on such terms, and in such manner as said may deem most advantageous.

(*Continue as in Form* 1 *to the end.*)

No. 6.

Mortgage on Machinery.

(*As in Form* 1 *to* **, *continuing :*) It is an express condition of this mortgage, and it is agreed that said machinery above described, shall be and remain personal property, until the notes above described are fully paid, notwithstanding the manner in which such machinery, or any part thereof, shall be affixed to the realty.

(*Continue as in Form* 1 *to the end.*)

No. 7.

Power of Attorney to Foreclose.

I, do hereby nominate and appoint , as and for my true and lawful attorney, for me and in my name to take possession of the goods and chattels, described in the within mortgage (*or, if the power to foreclose is written on a different paper, describe the mortgage*), and to foreclose the said mortgage by a sale of said goods and chattels, in conformity with the power therein contained, and I authorize my said attorney to do all acts for me and in my behalf, which I, under the said power and under said mortgage could lawfully do, and for that purpose to procure the aid or assistance of any person or persons.

And I also covenant with the said , that the sum of dollars, and interest thereon from the day of , 18 , is now justly owing to me on the said mortgage, that I am the lawful owner and holder thereof, and that I will indemnify and hold him harmless for any acts done by him in carrying out and executing the power hereinbefore granted to him.

Dated this day of , 18 .

(*Signed*)

.....(L. S.)

No. 8.

Complaint to Foreclose Under the Code of Civil Procedure.

SUPREME COURT — Chemung County.

Henry L. Rosenbaum
agst.
George W. Bills.

The plaintiff above named complaining of the defendant herein for a cause of action alleges.

That heretofore and on the first day of November, A. D. 1888, one George W. Bills, the owner of the chattels therein described, made, executed and delivered to one George Doane an instrument in writing of which the following is a copy:

"To all to whom these presents shall come, know ye, that I, George W. Bills, of Southport, Chemung county, State of New York, am indebted unto George Doane, of Elmira, Chemung county, New York, in the sum of one hundred dollars, being for the purchase-price of one horse. Now for securing the payment of the said debt, and the interest thereon from the date hereof, to the said George Doane, I do hereby sell, assign and transfer to the said George Doane, the property described in the following schedule, viz.:

One bay horse, being the same this day purchased of George Doane, one red cow, one lumber wagon; said property now being and remaining in the possession of the said George W. Bills: Provided always, and this mortgage is on the express condition that if the said George W. Bills, shall pay to the said George Doane the sum of one hundred dollars and interest thereon as follows: In ninety days from the date hereof, which the said George W. Bills hereby agrees to pay, then this transfer to be void and of no effect; but in case of non-payment of the said debt and interest at the time above mentioned, then the said George Doane shall have full power to enter upon the premises of said party of the first part, or any other place or places where the goods and chattels aforesaid may be; to take possession of said property; to sell the same at public or private sale, and the avails (after deducting all expenses of the sale and keeping of the said property) to apply in payment of the above debt, and in case the said George Doane shall at any time deem said property or debt unsafe, it shall be lawful for him to take possession of said property, and sell the same at public or private sale, previous to the time above mentioned, for the payment of said debt, applying the proceeds as aforesaid, after deducting all expenses of the sale and keeping of the said property. And the said mortgagee, his representatives or assigns, may purchase at any such sale, in the same manner, and to the same effect, as a person not interested herein. If from any cause said property shall fail to satisfy said debt, interest and costs and charges, I covenant and agree to pay the deficiency.

In witness whereof, I have hereunto set my hand and seal the third day of November, in the year of our Lord one thousand eight hundred and eighty-five.

GEORGE W. BILLS. (L. S.)

That said mortgage was duly filed in the town clerk's office of the town of Southport, where the defendant resided, at the time of the execution and filing thereof, on the 2d day of November, 1888, and where said chattels were situated at the time of such execution and filing; that the said instrument was duly sold, transferred and assigned to this plaintiff by the said Doane on the first day of December, 1888, and he is now the holder and owner thereof; that the sum secured by said mortgage is due and payable, and that the same remains unpaid, and there is now due and secured and owing by and on said mortgage, the sum of one hundred dollars, with interest from the first day of November, 1888. That said mortgage became due and payable on the fourth day of February, 1889, and that no part thereof has been paid, although the same has been duly demanded.*

Wherefore plaintiff demands judgment, for the foreclosure of said mortgage, and sale of the chattels therein described, by a proper person to be designated by the court, and that the proceeds be applied to the payment of the amount due plaintiff and the costs of the action, and that plaintiff have judgment against the said defendant for any costs and deficiency which cannot be satisfied out of the fund realized from the sale of said chattels, after first paying plaintiff the amount due him and secured thereby.

DIX W. SMITH, *Plaintiff's Attorney.*
Elmira, N. Y.

(*Add verification.*)

(*If the property is not in the possession of the mortgagor, continue from the * as follows*):

That the defendant, Bills, has disposed of the property described in said mortgage, and the said property is now claimed to be owned by the defendant , who has refused to deliver the same to the possession of this plaintiff, although the possession thereof has been demanded from him.

No. 9.

BOND.

SUPREME COURT — CHEMUNG COUNTY.

Henry L. Rosenbaum
agst.
George W. Bills.

Whereas, the above-named Henry L. Rosenbaum, as plaintiff, has commenced, or is about to commence, an action by summons for the foreclosure of a lien on a chattel, against the above-named defendant, and has made, or is about to make, application for a warrant to seize such chattels described in the complaint, according to the provisions of the Code of Civil Procedure.

Now, therefore, we, W. J. Roy, of Southport, by occupation a farmer, and Jacob Hevener, of the city of Elmira, by occupation a merchant, do hereby jointly and severally undertake, promise and agree to and with the said defendant, that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to said defendant, and all damages which he may sustain by reason of the said warrant, not exceeding two hundred and fifty dollars.

W. J. ROY.
JACOB HEVENER.

Dated *February* 8, 1889.

(*Add acknowledgment, justification and approval.*)

No. 10.

AFFIDAVIT FOR WARRANT.

(*Title as before.*)

CHEMUNG COUNTY, *ss.:*

Henry L. Rosenbaum of the city of Elmira, in said county, being duly sworn says, that he is the owner and holder of a chattel mortgage given by one George W. Bills to George Doane, November 1, 1888, and filed in the town clerk's office of the town of

Southport, where said mortgagor then resided, and where the chattels therein described were then located, on the first day of November, 1888, for the purpose of securing the payment of the sum of one hundred dollars with interest thereon in three months from the date thereof; that the property pledged in and by said mortgage consists of one bay horse, one red cow, one lumber wagon; that the whole of said sum is due with interest thereon, and remains unpaid, and this deponent has brought this action to foreclose the lien of said mortgage; that the property described in said mortgage is now in the possession of the defendant the said , claiming to be the owner thereof, and that said , refuses to deliver the possession of the said property to this plaintiff, although the same has been duly demanded; that the value of said property is one hundred dollars.

That the said defendants, Bills and , reside at the town of Southport, in the county of Chemung, and said property is now at said town.

Deponent further says that no previous application has been made for a warrant to seize said chattels in this action.

Subscribed and sworn to before me, this day of , 1889.

No. 11.

WARRANT.

The People of the State of New York to the Sheriff of the County of Chemung:

WHEREAS, In an action brought in this court, an application has been made to the justice granting this warrant, by Henry L. Rosenbaum, plaintiff, for a warrant to seize and safely keep the chattels hereinafter described, to abide the final judgment in said action, in which said Henry L. Rosenbaum is plaintiff, George W. Bills, and , defendant; and it appearing by affidavit to the satisfaction of the justice granting this warrant, that a cause of action such as is specified in section 1737 of the Code of Civil Procedure, exists in favor of the plaintiff and against the defendants, to foreclose a lien for the sum of one hundred dollars, with interest thereon from November 1, 1888, upon said chattels, and

that the plaintiff is not in possession of said chattels, and the plaintiff having given the undertaking required by law:

Now, you are hereby commanded to seize the following chattels, to wit:

(*Specify chattels.*)

Being the chattels described in the complaint in this action, or so much thereof as may be found in your county, and to safely keep the same to abide the final judgment in the action, and that you proceed herein in the manner, and make your return within the time required of you by law.

Given under the hand of one of the justices of the Supreme Court, at the chambers in the city of Elmira, this day of , 1889.

WALTER LLOYD SMITH,
Justice of the Supreme Court.

DIX W. SMITH,
Plaintiff's Attorney, Elmira, N. Y.

No. 12.

ASSIGNMENT OF MORTGAGE.

This instrument, made this day of , 188 , between , of the , of , of the first part, and , of of the second part;

WITNESSETH, That the part of the first part, for a good and valuable consideration to in hand paid by the part of the second part, ha sold, assigned, and transferred, and do hereby sell, assign, and transfer to the part of the second part, a certain chattel mortgage bearing date the day of , 188 , made by

And filed in the clerk's office of county, on the day of 188 , at o'clock M., together with the debt thereby secured, and all sums of money due and to grow due thereon.

And the part of the first part hereby covenant that there is due on said mortgage, the sum of

IN WITNESS WHEREOF, The part of the first part, ha hereunto set hand and seal the day and year first above written.

STATE OF NEW YORK, } ss.:
County of }

On this day of , in the year one thousand eight hundred and eighty , before me, the subscriber, personally appeared to me personally known to be the same person described in and who executed the within instrument, and he acknowledged that he executed the same.

No. 13.

SATISFACTION OF MORTGAGE.

DO HEREBY CERTIFY, That a certain chattel mortgage bearing date the day of , one thousand eight hundred and , made and executed by

and filed in the office of the clerk of the of , on the day of , in the year one thousand eight hundred and , at o'clock minutes M., is with the debt thereby secured, FULLY PAID AND SATISFIED.

And I hereby consent that the same be discharged of record.

Dated the day of , 188

(*If mortgage is acknowledged, add acknowledgment.*)

No. 14.

STATEMENT OF MORTGAGEE ON REFILING CHATTEL MORTGAGE.

I, , the mortgagee within named, do certify and state that there remains due and unpaid on the mortgage of which the

foregoing (*or within*) is a true copy, the sum of dollars, and interest thereon from the day of 188 , which sum is the amount of my interest in the property described in said mortgage claimed by me by virtue thereof.

Dated this day of , 188 .

.....

No. 15.

NOTICE OF SALE UNDER CHATTEL MORTGAGE.

By virtue of a chattel mortgage, executed by , to , dated on the day of , 188 , and which was duly filed in the office of the clerk of the , of , on the day of , 188 , I will expose for sale at public auction at , in the said of , on the day of , 188 , at o'clock, in the forenoon of that day, the following goods and chattels, to wit:

(*Specify chattels.*)

Dated the day of , 188 .

(Signed)

.....

Mortgagee's Agent.

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